RECORD AND BRIEFS

No. 16-6219

FILED
FEB 27 2017

In The
Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed September 22, 2016
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U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:13-cv-00506-O

Davila vs. Stephens, Director TDCJ-CID
Assigned to: Judge Reed C O'Connor
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

05/19/2014	17	AMENDED PETITION for Writ of Habeas Corpus filed by Erick Daniel Davila. In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the *Judges Copy Requirements* is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. (Filer fee note- IFP granted or CJA appt..) Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: *Attorney Information – Bar Membership.* (Attachments: # 1 Exhibit(s)) (Kretzer, Seth) Modified on 9/5/2014 (ali). (Entered: 05/19/2014)
04/21/2015	38	Memorandum Opinion and Order Court denies Davila's petition for a writ of habeas corpus. Court denies Davila a certificate of appealability

		because he has failed to make a substantial showing of the denial of a constitutional right. If Davila files a notice of appeal, he may proceed informa pauperis on appeal. (Ordered by Judge Reed C O'Connor on 4/21/2015) (ult) (Entered: 04/21/2015)
04/21/2015	39	FINAL JUDGMENT Ordered, Adjudged, and Decreed that the claims in the petition are dismissed with prejudice. All relief not expressly granted is denied. (Ordered by Judge Reed C O'Connor on 4/21/2015) (ult) (Entered: 04/21/2015)

General Docket
United States Court of Appeals for the 5th Circuit

Court of Appeals Docket #: 15-70013

ERICK DANIEL DAVILA

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
Terminated: 05/05/2016

Respondent-Appellee

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

05/07/2015	ELECTRONIC RECORD ON APPEAL FILED. Exhibits on File in District Court? No. State Court Papers included? Yes. Electronic ROA deadline satisfied. [15-70013] (MFY)
05/31/2016	REVISED UNPUBLISHED OPINION FILED. [8213460-2] [15-70013] (JMA)
06/28/2016	COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Erick Daniel Davila [8227573-2] Without Poll. [15-70013] (MRW)
01/17/2017	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Erick Daniel Davila

in 15-70013 on 01/13/2017. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. [8402916-1] [15-70013] (LGL)

REPORTER'S RECORD

VOLUME 14 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 10th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

CASHMONAE STEVENSON,

[18] having being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS BURKS:

Q. Good morning.

A. Good morning.

Q. Can you turn to the jury and tell them your name.

A. Hello. My name is Cashmonae Stevenson.

* * *

Can you tell the jurors how of old you are, Cashmonae?

A. Eleven years old.

* * *

[19] Q. Now, let me ask you about something that happened around Nahtica's birthday. Do you remember that?

A. Yes.

[20] Q. Do you remember the day, Sunday, April 6th, 2008?

A. Yes.

Q. What did you do that day?

A. Went to church and had a birthday party for my sister.

Q. Let me ask you first about the birthday party for your sister. Is that for your sister, Nahtica?

A. Yes.

* * *

Q. Did you do anything to prepare for the birthday party?

A. Went to go get party favors.

Q. And what kind of party favors did you get?

A. Crowns, silly spray, candy bags and cake.

Q. And what kind of cake did you get?

A. Hannah Montana cake.

Q. Now, all of the people that lived in your house at 5701 Anderson, were they there at the party?

A. Yes.

Q. Were there other people at the party?

[21] A. Yes.

Q. Who else was at the party?

A. My cousin and her family; Brianna Scott; my Aunt Sheila – I mean, my cousin, Sheila. My Uncle Jerry. And kids, other kids.

Q. And when you say other kids, how many kids would you say were at the party?

A. Sixteen.

Q. Okay. Now, during the party, what did you-all do?

A. We rode bikes, played and went to the park.

Q. Okay. And at some point did you come back from the – from the park?

A. Yes.

Q. And what did you-all do after that?

A. Played with the silly spray.

* * *

Q. Did anyone eat the Hannah Montana cake?

A. Yes.

Q. Okay, Tell the jury about that. When did you-all eat the cake?

A. Around the time when the shooting happened.

* * *

[22] Where were people eating cake?

A. On the porch.

Q. In the front yard of 5701 Anderson?

A. Yes.

Q. And how many people were eating cake and out in the front yard?

A. The kids and the adults.

Q. And can you tell the jurors which adults were outside at this time?

A. Brianna's family, me, my sister, my two brothers, my granny, my auntie, and my cousin Sheila.

Q. And was your Uncle Jerry outside?

A. Yes.

Q. Tell the jurors what happened while you were all outside eating cake and ice cream.

A. I saw this black car come from the left – from the right side of my house, and then it went down the street. Then it went around the corner Then it came back from down the street. He went into the entrance right there and went around the dumpster, then came back and parked on the side of the house in front of us.

Q. All right. Did you notice anything about the black car when it passed by?

A. Yes, it had a gun with a red dot on there.

* * *

[23] Q. What did you think when you saw that?

A. I thought something – I thought to myself, I thought something was going to happen, but I didn't tell nobody because my – 'cause my family, that –I was scared they was probably gone say, Be quiet, Monae, you don't know what you talking about."

Q. Okay. After you saw the car with the gun and the red dot can you tell the jurors what you saw next – saw and heard next?

A. I saw this man – this man running across the field and stood next to the house that was in front of us and started shooting. And the red dot that was on the gun pointed towards the house – pointing towards our house.

Q. Okay. Do you remember how many times the man with the gun with the red dot shot at you-all?

A. No.

Q. Was it more than one?

A. Yes.

Q. Once – what were you-all doing once you – what did you-all do once you heard the man – saw the man shooting the gun?

A. We –we – stacked on top of each other when we went – when we went in the door.

[24] Q. Okay. So did you-all run to the house?

A. Yes.

Q. Okay. And when you say you were stacked on each other, what do you mean by that?

A. I was at the bottom, and other people was on top of me.

Q. Did you have a cousin names Queshawn?

A. Yes.

Q. Was she outside and at the party?

A. Yes.

Q. Do you remember what she was doing right before the shots were fired?

A. Eating her ice cream and cake.

Q. And where was she in – in front of the house?

A. By the bikes.

Q. Do you know if she was sitting on the porch or do you know where – what she was sitting on?

A. She was sitting on the porch.

Q. By the bikes?

A. Yes.

Q. Now, you said that everyone went, and they were stacked on top of each other. Tell the jury what you remember happening next.

A. My mama pulling my –my mama pulling my arm and then putting me on the couch. And I said, "Ow.

[25] And she said, "My baby, my baby."

And then she went in my granny [sic] room and said, "My mama, my mama."

* * *

Q. Okay. When she pulled you out from underneath everyone, where – where did she go – where did you go?

A. On the couch.

* * *

[26] Q. And while you were on the couch, did you feel anything on your body?

A. Yes.

* * *

A. I felt this sting in my arm and this burn.

Q. Okay. Can you point to where you felt the sting in your arm for me?

A. (Witness complied.)

Q. And you're pointing to your right elbow?

A. Uh-huh, yes.

* * *

Q. What was everyone doing in the house when you were being pulled from underneath the stack?

A. Screaming and trying to get to safe places.

Q. Did your mother ever move you from the sofa?

A. Yes.

Q. And why did she move you from the sofa?

A. So my Uncle Jerry can put Queshawn Stevenson on the couch.

Q. And where did your Uncle Jerry get Queshawn from?

[27] A. Outside.

Q. When he brought her in, do you remember what she looked like?

A. Yes.

Q. Can you tell the jury?

A. She lookeded [sic] dizzy.

* * *

[28] Q. What happened after that?

A. The ambulance came. And as soon as I was fixin' to pick my elbow up, I saw that – that I was – been shot twice in my left hand.

Q. And was your left hand hurting?

A. No.

Q. Did you see any – when you say you saw that you were shot in your left hand, what made you think you were shot?

A. I had holes in my hand and blood on my fingers.

* * *

Q. Were there other people in the house that were hurt?

A. Yes.

Q. Who else was hurt?

A. Sheila, Nahtica.

Q. Let me ask you real quick. Is Sheila a grown-up, or is she a little kid?

A. A grown-up.

Q. So Sheila and Nahtica, and who else?

A. Brianna.

Q. And is Brianna a little kid, or is she a grown-up?

A. A little kid.

[29] Q. And who else was hurt?

A. Me, Queshawn and Annette.

Q. Your granny?

A. Yes.

Q. Did you see your granny?

A. Yes.

Q. Where was she?

A. In her room on the floor.

* * *

[31] Q. After that day, Cashmonae, did you see your cousin, Queshawn, again?

A. No.

Q. Did you see your granny, Annette, again?

A. No

* * *

[136] Q. So you – from where you were you could see that kids were outside playing?

A. Yes, ma'am.

Q. All right. Now, you said that the guy that got out of the car with the gun was up against the house across the street, is that right?

A. Yes, ma'am.

Q. And tell the jury what you saw him do.

A. He fired the gun, then ran to the other end of the building, stood in the street, and fired it and then hopped in the car.

* * *

[137] Q. Okay. When you notice that there were a bunch of people outside of the house, did you see whether or not there was a – an adult male outside?

A. Yes.

Q. Did you know that person?

A. Yes.

Q. And who was that person?

A. Dooney.

Q. Dooney. Do you know Dooney's real name?

A. No.

Q. Was he related to Ms. Stevenson?

A. Yes.

Q. How was he related to Ms. Stevenson?

A. Her son.

Q. Was he the only adult male that you saw outside the house?

A. Yes, ma'am.

Q. The rest of them were women and children?

A. Huh?

Q. The rest were women and children?

A. Yes ma'am.

* * *

[138] Q. How many shots did he fire from the corner of the house?

A. About nine.

Q. Okay. And what were the – the women and children doing when – when the shots were being fired?

A. The granny, she started pushing the kids in the house told them to get in the house. And the little girl got shot in the stomach. She was laying on the ground outside.

* * *

[139] Q. Okay. Now you said the granny started pushing the kids in the house. What happened next?

A. She got shot a couple of times.

Q. Who is she?

A. The granny.

Q. You saw her get shot?

A. Yeah.

* * *

[140] Q. After – and you said he fired about how many shots there at the corner?

A. About nine.

Q. And then what did he do?

A. Ran to the other side of the building and shot, and then hopped in the car and drove off.

* * *

[145] Q. And let me just ask you, can you describe the response that the guy with the gun had when Big Boy moved out of his line of vision?

A. He seemed like he was mad 'cause he had missed the chance to get him.

Q. And did he do anything with the weapon in response to his attempt, his missed attempt?

A. Huh-uh but picked it back up and fired.

Q. Okay. So he put the weapon down?

A. (Moves head up and down.)

Q. Is that "yes"?

A. Yes, ma'am.

Q. Did he appear frustrated to you?

A. Yes, ma'am.

Q. When he picked the weapon back up to fire who was left on the porch of the house?

A. Nobody but the girl that was laying outside.

Q. No, I mean before the shots were fired. When he picked the gun back up to fire it tell the jurors who was out on the porch.

A. The granny and some of the kids.

Q. Women and children?

[146] A. Yes.

* * *

[211] SHAWN GREENE,

having been duly sworn, testified as follows:

* * *

[214] Q. And what was it about the condition of the house that led you to believe there was a birthday party going on?

A. There was banners. You could see birthday hats. [215] There was cake, presents, things like that.

* * *

[216] Q. Okay. And where within the house were you able to locate injured people?

A. Immediately in the front door in the living room and kitchen area was pretty much everybody that had been injured. In the back bedroom there was one deceased female that we had located, and nothing else throughout the house.

Q. Other than the deceased female that you located, were there any other injured adults?

A. From what can recall, I believe there was one other injured adult that looked like she had been injured in the leg.

Q. And were the rest of the injured persons all children?

A. Yes.

Q. And approximate – approximately how many children do you recall having been injured?

* * *

A. From what I could see there was three.

* * *

[239] ARLETTE KEYS

having been previously sworn, testified as follows:

* * *

[249] Q. And – and would you describe that little girl to us that was –that you noticed inside the house.

A. Excuse me. Is that really necessary? Do I have to?

Q. Just – just very generally. Was she hurt?

A. Badly, uh huh.

Q. And what –what part of her was hurt?

A. Her abdomen and her shoulder.

Q. And how did you know if she was hurt?

A. It was blood everywhere. The towels were being soaked in a matter of seconds.

* * *

REPORTER'S RECORD

VOLUME 15 OF 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 11th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[37] JERRY STEVENSON,

having being first duly sworn, testified as follows:

* * *

[43] Q. * * * How old was Queshawn when she died?

A. Five.

Q. And your mother, Annette, State's Exhibit 80, how old was she when she passed away?

A. Forty-seven.

Q. And let's talk a little bit about the day they died. Where did this happen?

A. 5701 Anderson.

Q. And why were you-all there that day?

A. A birthday party.

Q. Whose birthday party?

A. My niece, Nahtica.

Q. How many people were present at the birthday party?

A. I would say from anywhere from – I'd say about at least 17 people, 16, 17 people, including kids.

[44] Q. Of the 16 or 17 people that were there, how many were adults?

A. Sheila, my mother, my sister, me and my other sister. Five.

Q. And can you – you kind of went through them, but can you tell the jurors what adults were present?

A. My – my two sisters; my cousin, Sheila; and my mother and me.

Q. Were there any other males, your – like your brother, Jeremy, were there any –

A. No, ma'am.

Q. No other male adults?

A. No, ma'am. I was the only male.

* * *

Q. About what time did the party begin?

A. I'd say 6:00-something, I believe.

Q. And tell us what you-all did. What was going on at the party?

A. Everybody was having a good time, having a birthday party. Doing what they do at a birthday party, especially the kids.

Q. And what were the kids doing?

A. Having fun, riding their bike, running around, [45] enjoying they self.

Q. Now, at some point did something change?

A. Yes, ma'am.

Q. Tell the jury about that. What happened?

A. I'd say it was probably, like, an hour after we left – an hour, hour and a half after we left the party. I think, like, the party begin at six o'clock, like 6:00-something. I'm not sure what time.

I say my girlfriend got off at eight o'clock, but the party was still going on. So I phoned her and let her know that we was going to be late because the party was still going on.

But everybody was outside just having a good time. I was telling my kids to finish up doing what they

– what – eating they cake and ice cream. And I say around about 8:00 – I believe 8:20, I looked at my watch 'cause I was telling the kids, "We gotta go. We late 'cause mama got off at 8:00."

So I say about 8:20 – about 8:21 or 22, I seen a black car approach over the speed humps and turn the corner by my mama's house. I didn't think nothing of it, but I seen a red beam. Just like a beam, but I noticed it was a gun.

* * *

[54] Q. * * *

Where did you see the individual with the rifle?

A. At the corner of the house right here across from my mother's house. * * *

* * *

Q. When you saw – when you saw that and heard the shots, what did you do?

A. I turned and looked to see where it was coming from, and it was coming from behind – behind me.

Q. And then what did you do?

A. Me – well, every – well, me and my – like, I had my son hand at the time, and me and my son and everyone else tried to enter the house.

Q. Were you-all successful in entering the house?

A. We was – everybody was piled on top of one another and just crazy.

Q. Do you remember where your mother was?

A. At the time –

Q. At the time of the shots.

[55] A. Okay. At the time of the shots, I remember my mother, like, telling me – putting her hands up, like, getting all the kids and trying to get everybody in the house. And everybody made it in the door. And I seen my mother just, you know, like, walking – I think she was in – by the couch, I'm not sure. I know she was by the front door or whatever, but I think she was moving towards her room.

* * *

Q. And where was your daughter, Queshawn?

A. At the time, I – I – she was not in the house.

Q. Did that concern you?

A. Yes, ma'am.

Q. What did you do?

A. At the time that we went in the house and I pushed my son in the corner, I left him at the corner and [56] was hollering for Queshawn's name, "Queshawn, Queshawn." And I was going through, like, to my mother's room and hollering, "Queshawn, Queshawn." But she didn't answer. I went to the door, and she got shot.

* * *

[57] A. After I called Queshawn name out, didn't hear her respond, I immediately went to the door.

* * *

[60] Q. When you saw Queshawn outside, what did you do?

A. I immediately picked her up. Went over there and picked her up.

Q. And what did you do with her?

A. I carried her in the house and laid her on the couch.

Q. Can you describe for the jury what condition she was in?

A. Excuse me. I just thought she was shot one time. When I picked her up, she had her hand on her – on her stomach. And I picked her up, and I took her in the house, and I laid her on the couch. And I was asking for towels, and I raised her shirt up, and her guts was hanging out, so I proceeded to put towels on that. And [61] then she happened to turn her head, and I seen her neck, and I just lost it. I just went crazy.

* * *

Q. * * * What was the – tell us what was going on in the house at this time.

A. A lot of commotion. Crying kids screaming, "I'm bleeding, I'm bleeding." I mean, that's all you

heard was kids yelling, "I'm bleeding." That's all you heard. Crying, screaming.

* * *

[63] Q. Was Queshawn saying anything or doing anything?

A. Yes, she was.

Q. What was she saying to you?

A. She was rubbing my face and breathing and saying she wanted her mother.

* * *

[65] Q. Now, did you at any point go into your mother's bedroom?

A. Yes, at a point I did.

Q. At what point did you do that?

A. At the point where I think the police had came, and they had her door closed. And I opened the door and I went in, and I asked them was my mama okay.

Q. You asked them?

A. Was my mother okay.

Q. Did you see your mother?

A. Yes, I did.

Q. And where was she?

A. Laying on the floor.

Q. Was your mother saying anything?

A. No, she wasn't.

* * *

[66] Q. And when it was all said and done, how many people had been injured in the house? Or just tell us who had been injured.

[67] A. Nahtica, Cashmonae, Queshawn, Annette, Sheila, Brianna, I believe.

Q. And how old is Brianna?

A. I'm not sure.

Q. Is she a young girl?

A. Yes, ma'am.

Q. Did you see her injuries?

A. Like, I think two of the bullets grazed the top of her head and cut her braids.

Q. Actually cut her braids off?

* * *

Q. Okay. Tell us about Queshawn, where did she go?

* * *

A. * * * the police * * * told me they had to Care-Flite Queshawn to Cook's. So they brought Queshawn

outside. I was walking with her to the ambulance, and they took off.

* * *

[68] Q. And did she expire in the hospital?

A. Yes, ma'am.

* * *

[126] J.J. JEANES,

having been previously sworn, testified as follows:

* * *

[222] Q. * * *

So am I correct in – in – in determining that there was approximately one, two, three, four, five, six bullet holes on the outside with a couple question marks on two of them?

A. Yes.

* * *

[251] SHEILA MOBLIN,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILL:

Q. Tell the jury your name, please.

A. Sheila Moblin.

Q. And Ms. Moblin, how old a woman are you?

A. Thirty-six.

* * *

[253] Q. And approximately how many people were at the birthday party at that time?

A. It was about – about 15 or more children, and – and it was – well, me and Jerry and Annette and Tamesha and Talisha, which was the adults that was there, about five adults.

Q. So Jerry was the only adult male there?

A. Yes.

* * *

[254] A. It was, like, a little bench, a white bench that was there, and I was sitting on it.

Q. And who else was around you at that time?

A. Well, it was the childrens that was sitting, like, in front of me on the porch. And Jerry was standing, like, to the left of me; and Annette was, like, on the right.

Q. And what were the kids doing out on the front porch at that time?

A. Eating cake and ice cream.

Q. And when you realized there were shots being fired, what did you do?

A. I got up, and I started running in towards the house. And like, a couple of childrens that was in front

of me, and I kind of like – all three of us ran, like, off into the restroom, in the back restroom.

Q. So it would be a fair statement when the shooting started, pretty much everybody started running in that house?

A. Yes.

* * *

REPORTER'S RECORD

VOLUME 17 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 13th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[49] TOBY REED,

having been previously duly sworn, testified as follows:

* * *

[56] A. The defendant, he sped out of the parking lot and went northbound . . . excuse me, I've just got to figure out the name of the street.

* * *

Q. About how fast is the defendant traveling at this point?

A. I would say in excess of 50, 60 miles an hour.

Q. And is this a residential area?

A. Yes, ma'am.

Q. What happens next?

A. Once he was traveling northbound on Oakland Hills, he then made a left-hand turn, failed to stop at the stop sign, I mean, clearly blew a stop sign going westbound onto Boca Raton. We tried to keep up with him, [57] maintain the visual of him. He traveled a few blocks and then made a north – another northbound turn onto – it's the country – Country Club Drive.

Q. Does Country Club Drive dead-end into an apartment complex?

A. Yes, ma'am.

Q. Okay. And what happened once – did you-all arrive at that apartment complex?

A. Yes, ma'am, we did.

Q. Can you tell the jurors what happened when you got there?

A. He proceeded at a high rate of speed into the complex, went to the northwestern end of the complex. He struck two vehicles that were parked, and then doubled back and went back southbound through the complex, which kind of scattered our team throughout. So the direction we were traveling him with the SWAT officers and us and then the – my other partner that's the agent, we all switched roles, and I think Agent Martinez was the lead vehicle, the SWAT officers

became the second vehicle, and me and my partner became the third vehicle.

* * *

[58] Q. Tell the jurors what happened next.

A. Once the vehicle – once Mr. Davila struck the vehicles, he then proceeded back southbound throughout the complex, Once he exited or started exiting the complex, he actually jumped out of his vehicle while it was still in motion and took off running.

Q. What did you do in response to him running?

A. When we had a direction of travel that he was actually running, Agent Martinez called out that he had a gun. So me and my partner tried to intercept him. He was running northbound, so we tried to intercept him through two buildings that were northbound in his position.

Q. When you tried to intercept him between the two buildings, did you see anything? Did you see anything that he was doing?

[59] A. Yes, ma'am. We ran between two buildings. And at about that time he came around the corner trying to jump into the patio balcony of a first floor apartment right there.

Q. And did he actually jump into that back patio area?

A. He observed me and my partner running at him, so he doubled back and took off running eastbound through the complex.

* * *

Q. Did you at some point apprehend him?

A. Yes, ma'am.

* * *

[152] BRENT JOHNSON,

having been previously sworn, testified as follows:

* * *

[161] Q. And did the medical investigators arrive?

A. They did.

Q. And once they came in contact with the body of Annette Stevenson, did you notice any injuries on her?

A. I did.

Q. Can you describe those for the jury.

A. She had bullet – or what appeared to be bullet holes in her – one in her breast, and she had some on her hip.

* * *

[204] Q. (BY MS. BURKS) Okay. Detective Boetcher, I'm going to have you read – Detective Johnson, I'm going to have you read again, if you – do you see State's Exhibit 166 here on the ELMO?

A. Yes, ma'am.

Q. And where does the statement actually begin? What's the first word?

A. "My name is Erick Davila."

Q. Can we start – and is that information in that paragraph the same, I guess, biographical information that he gave us before?

[205] A. Yes, ma'am.

Q. And can we start with this paragraph, and if you would read that – read this statement to the jury.

A. Excuse me, "Back in the first part of 2005, one of the Crip members tried to run my mother off the road while she was pregnant. The person who tried to run my mom off the road used to live right by us. I think it was intentional that they tried to run her off the road. I know it was intentional because she tried to get away from him, and she got away from them. They also tried to talk to my sister, but she rejected him and he got mad and made comments about your rejecting me about woo-woo-woo, which meant that I was a Blood and he was a Crip." Keep reading?

Q. Yes.

A. "Sometime in the end of 2005, I was walking down the street, and I was shot by some of the members of Polywood, and they were in a gray Nova and now it's gold. I got shot in the arm and grazed in the head. I know that it is stuff dealing with the same family that lives in the third gate of the apartments.

I met Nichcole and we started dating, and she is pregnant with my baby now They have been mugging my car, looking at me. It's like they wanted to get me, so on Sunday I was in my car and I was driving and [206] Garfield was in the car with me. As we passed by, they jumped off the porch and into the street, and Garfield seen them and said, this don't look good, like they were going to do something. When I seen them walk to the car, they popped the trunk and I was driving down the street. I put the window down so they could see me. I rolled to the back of the apartments, and for him to drive. I told him, they ain't fixing to do this – they ain't fixing to do me like this, cause this is my hood. I told Garfield that I was going to do what I do, and we can have a shoot 'em up. I told him I was going to drive to the back and to let me out of the car and for him to leave. I had the AK with me, but I didn't have a clip, so I had to go to Ms. Sheila's to get the clip.

We went around to the back of the apartments, and the AK has a scope and a red beam on it. I went up to Ms. Sheila's door carrying the AK. A little boy answered the door, and I went in and got the clip that was right under the sofa. I got the clip and put it in the AK. When I went back outside, I went through the field where the shooting happened. Ms. Sheila's house is

kind of a trap, that is, where everybody goes to keep their guns and their weed.

Garfield had the AK in the front seat with him as we passed by in the front seat. Once we got [207] around to the back, I got out with the AK. When I told Garfield it was my hood and we were going to have a shoot 'em up and I was going to scare them and let them know that I had a gun, I told Garfield to drive around to the front.

Garfield made the mistake and went down Anderson, the wrong street. By then I had walked through the back of the apartments, through the middle of the field, to the field across the street. I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude was in the middle of the street. The other three were on the porch. I wasn't going to give them a chance to get a gun.

Garfield had stopped my car in the middle of Anderson, and I thought they were going to start shoot up my car. I only let off 10 rounds, and I had 21 in the clip. I was trying to get the guys on the porch, and I was trying to get the fat dude. I wasn't aiming at the kids or the woman and don't know where the woman came from. I don't know the fat dude's name, but I know what he looks like, so I recognized his face. I ran up to my car and I was pissed because he was stopped there, and I asked him what he was doing. He was supposed to go down to Briery and on to Fitzhugh, but he went down the wrong street.

[208] I got in the car on the passenger's side. I let him drive and I went back to Copper Creek, 1213, to my apartment. I dropped Garfield off at his house. He represents Norris Street. I took the gun upstairs in the apartment and went to sleep. I kept the gun with me all day Sunday, and I always kept it with me because I thought they would get me. I kept the gun in a duffel bag in the closet, and I took it with me every time I left.

The pistol belongs to Garfield, and he had it with him in the car and left it there when he left. I did all the shooting and not Garfield. As far as where the AK is, Terminal has it and must have took it from the apartment when I was arrested.

* * *

REPORTER'S RECORD

VOLUME 18 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL
VS.	DISTRICT
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 17th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[140] Q. (BY MR. GILL) * * * Let me direct your attention back here to State's Exhibit 161. Right here behind you' And ask if you recognize the contents of State's 161?

* * *

I recognize State's Exhibit 163 as a Norinco 7.62x39mm SKS S model rifle, semiautomatic rifle, that I examined in my laboratory.

* * *

[142] A. This is a Norinco, which is a China manufacturer. It's an SKS S, which is basically an SKS

model which is a precessor to the – it' s a Russian-type military weapon. It has a folding stock, which is why it is also – has the other S on the model, SKS S. The SKS S refers to the folding stock here, which it folds out of the way for – make it more compact.

It' s a bolt-action rifle, has a bolt. Semiautomatic,

* * *

[148] Q. Is there a bayonet on the front of that weapon?

A. Yes, sir, there is.

* * *

Q. Does the weapon have any sights, something that someone would use to sight the weapon?

A. Yes, sir. This weapon actually has [149] three different sights, sighting systems on it. Typically it will only come with one.

Q. What are the three sighting systems?

A. You have the adjustable sight, which is right here. And you will set it up. This moves up and down where you can adjust it for windage, for distance and such. You would – you know, based on if you're shooting how many – how many feet, yards or whatever, you would adjust it to that. And you would actually sight right through here. Which at this point because of this telescopic sight, this really is not of any use currently.

It also has a telescopic sight, which is here, which you adjust for distance, height, windage, side to side.

This is something where you would go out to a range, and you would actually sight the gun in – the – the sight in at certain distances. Say you have a target and you wanna bulls eye the target, then you're going to adjust this – you're going to shoot, see where you hit the target, and then adjust this to where you – you do hit the target. This is also telescopic because it magnifies your target. Okay?

The third – the third area – the third one is what's called a laser sight, which is right here. You can see on the wall here you have a red dot. Okay? [150] The red dot is, it helps you sight –it basically helps you target what you' re shooting at.

* * *

[163] A hollow point is a – is a bullet that has a cavity in the nose of it so that the – and the purpose of the hollow point is generally – it's twofold. When it strikes some, say, soft tissue or – or a target that's soft, then that allows that – then that material is going to go inside the bullet, inside the hole, the cavity, and it's going to – it's going to expand the nose of it.

So it's going to allow that bullet to mushroom, which is twofold: One is to re – reduce the amount of penetration of that bullet, so hopefully it won't go on through the target onto something that you didn't want to shoot. And the other purpose is also to disrupt more tissue of what – because the bullet, instead of, say, instead of this diameter, may be this diameter by the time it mushrooms, so it's actually going to cause a little bit more damage to whatever it strikes.

Q. Now, you had submitted eight Wolf and two Brown [164] Bear that came with the rifle; is that correct?

* * *

A. The Brown Bears were both jacketed hollow point. And the Wolfs, we had a combination of full metal jackets and jacket hollow points. Five of the Wolf were jacketed hollow points, and three were full metal jackets.

* * *

[263] GARY L. SISLER, M.D.,

having been first duly sworn, testified as follows:

* * *

[267] Q. (BY MS. BURKS) Dr. Sisler, can you go through and describe injuries or abnormalities that you observed on Annette Stevenson.

A. Yes, ma'am.

Q. How many injuries did you observe on her?

A. Actually, three.

Q. Can you describe those three injuries for the jury.

A. Yes, ma'am. There was an entry gunshot wound over the left back, and it exited over the left chest area. And then there were what we call fragment injuries over the left side of the left thigh. And when I

say fragment injuries, the projectile hit something and then – and then fragmented.

Q. Now, the wound that you observed to her back, [268] would you consider that to, be an entry wound or an exit wound?

A. I classified that as an entry gunshot wound.

Q. And the wound that you observed to her chest area, the left side of her chest, would you characterize that as an entry or an exit wound?

A. I classified that as an exit wound.

Q. Were there any intermediate targets, in your opinion, that a bullet would have struck prior to striking Annette Stevenson with regard to the wounds we've just discussed?

A. In my opinion, the bullet passed straight – straight on.

Q. So it – the – the wound that entered the back and exited the chest didn't hit any other target before hitting Ms. Stevenson?

A. Yes, ma'am.

* * *

[269] Q. (BY MS. BURKS) And where would the exit wound to the chest have been?

A. It was over the left breast area, left chest – or left chest wall.

Q. As part of your autopsy when you're looking at entry and exit wounds, do you determine the direction of travel or the path, if you would, of the bullet?

A. Yes, ma'am.

Q. And what did you determine the path of the bullet to be in this case?

A. I decided that the bullet passed upward, back to front, and left to right.

Q. Could this entry and exit wound be consistent [270] with someone who was bending forward or ducking?

A. I – in my opinion, it – it would be consistent with somebody leaning forward.

Q. Now, this wound, can you tell the jurors what type of injuries a person would have sustained as a result of that entry and exit wound, or what type of injuries Ms. Stevenson sustained.

A. Do you – are you questioning what – what it did when it went in, ma'am?

Q. Yes. Yes, Doctor.

A. It went through the eighth left posterior rib at the – the projectile fractured that. Then it went to the – went through the spleen, then the liver, then the heart, and then it exited over the left chest area here.

Q. Was this a fatal shot?

A. Yes, ma'am.

* * *

[278] Q. Now Dr. Sisler, were you also called upon to conduct the autopsy of Queshawn Stevenson in Case Number 0804134?

A. Yes, ma'am.

Q. And what was the approximate age of Queshawn Stevenson?

A. I have listed five years.

* * *

[279] Q. And upon your inspection of Queshawn Stevenson, did you notice any injuries or abnormalities to her?

A. Yes, ma'am.

Q. Can you describe those for the jury.

A. First I found a gunshot wound of the left side of the abdomen. In medical terms, we use "left flank." That exited the right – the exit wound was located over the right abdomen. Then I found another gunshot wound of the left shoulder that went through the subcutaneous tissue and then exited the base of the left neck.

* * *

[281] Q. * * * Can you kind of go through and show the jury what each of these wounds are and what this diagram is showing?

A. The lower left diagram shows the entrance wound that I mentioned before along the left flank to the left side of the abdomen. Then the top left shows where the projectile exited.

Q. And so when we see Wound A, it cor – that's the entry wound which corresponds to the Exit Wound A above it?

A. Yes, ma'am.

Q. And the other – the other wound?

A. The other wound was over the – the left shoulder. And that went along the subcutaneous tissue and then exited the left – the base of the left lateral neck.

Q. Let's discuss Wound A first. Let me show you what's been marked as State's Exhibit 223. Can you tell the jury what we're looking at here in State's Exhibit 223?

A. Yes, ma'am. This is the entrance wound of the left side of the abdomen or left flank.

Q. Did you notice anything about the shape or the size of the wound that we see in this photograph?

[282] A. It indicated to me that there was – the wound passed straight on, striking the individual without passing through an intermediate target.

Q. So this was a direct shot?

A. Yes, ma'am.

Q. And it entered on, I believe you said, the left side of the – the left flank area?

A. Yes, ma'am.

Q. And where did that – that wound exit?

A. The right abdomen, ma'am.

* * *

[283] Q. Can you describe for the jury what type of injuries Queshawn sustained as a result of, this wound?

A. There were multiple perforations or defects of the small intestine. And then there were massive defects of the vessels that supply the – the colon is supplied through vessels that pass through connective tissue. There were several tears of the vessels in the soft tissue that supplies the intestine.

* * *

Q. Was this a fatal wound for Queshawn Stevenson?

A. Yes, ma'am.

* * *

[284] Q. And can you show us where the entry wound and exit wound of Wound B would be in State's Exhibit 227?

A. The entry wound and then the exit wound?

Q. I'm sorry, Wound B.

A. The left – the left shoulder. And then it exited, went up through the soft tissue, and then exited at the base of the lateral side of the left neck.

Q. What type of injury did Queshawn sustain as a result of Wound B?

A. Mostly subcutaneous hemorrhage, tearing.

Q. Dr. Sisler, let me show you what's been marked.

* * *

Q. And did you notice anything about this wound?

A. I would say that the bullet struck straight on.

* * *

[285] Q. Did you notice anything about the damage to the tissue with regard to this injury?

A. It's extensive hemorrhage and tearing of the tissue.

* * *

REPORTER'S RECORD

VOLUME 20 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL
VS.	DISTRICT
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY,
	TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 19th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[52] (Open court. Defendant present, no jury.)

THE COURT: Both sides have seen the Court's – I'm sorry, the jury note which is marked as Jury Note No. 2 and entered, and the Court's proposed responses. And are there any objections to the Court's proposed response?

MR. FORD: May I respond? Judge, may I respond? May I approach and look at –

THE COURT: Yes.

MR. FORD: – both of them, Judge?

MR. GILL: May I double-check them also, Your Honor?

THE COURT: Yes

MR. GILL: Just to make sure that they're what we looked at. I think they are.

THE COURT: All right. And what says the State? Are there –

MR. GILL: We have no objections –

THE COURT: – any objections to the –

MR. GILL: – Your Honor. No objections.

THE COURT: Which would actually be two separate responses. One referring to the Charge, and the other giving an additional charge on the law.

MR. GILL: We have no objection to either response.

[53] MR. FORD: We object to – what – what we request the Court do is to send the original response the Court had regarding intentionally and knowingly.

THE COURT: Which refers to the law and defines it.

MR. FORD: That's right.

THE COURT: Right.

MR. FORD: And wait. And – until the jury indicates they can't reach – reach a resolution. And

then at that point, submit the other special charge, if it's called for, Judge. We'd object to submission of both charges – well, we'd object to the submission of the second charge.

* * *

THE COURT: All right. I'm gonna overrule your objection and send both responses. They're both filed-marked, and they'll be in the records of the Court.

* * *

(Jury continued deliberating)

* * *

[58] GABRIEL RAMOS,

having been duly sworn, testified as follows:

* * *

[88] Q. Okay, Mr. Ramos. Before we broke, I had asked you if you today in the courtroom see the individual that had the –had the gun on Joe on April the 4th of 2008. And do you see that individual in the courtroom?

A. Yes.

Q. Would you please point him out to the jury and describe what he's wearing.

A. He's sitting at the far end of that side of the table, and he's wearing a gray suit.

MR. GILL: Your Honor, may the record reflect he's identified the defendant?

THE COURT: It will so reflect.

Q. (BY MR. GILL) And what was that individual doing with Joe while you were watching?

[89] A. He had a – he pointed a gun to his head, and then was asking him for the money. And – and as soon as he came up and pointed the gun at his head, Joe just went down to the ground, and he had him on the ground telling him to give him the money.

Q. Well, was he – was he saying it like you're saying it now?

A. No, I mean, he was cussing at him and . . .

Q. Well, what was he saying, and how was he saying it?

A. I can't really recall word by word, but like he was telling him probably like, Give me the fucking money, bitch. And this and that, you know.

Q. You're going like this with your hand; what does that mean?

A. Well, he was – he had the gun on him like this, and he was, like, kind of – kind of like poking at him on his head with the gun.

Q. So he had the – he had the – this individual right over here, this man right over here, had a gun pointed at Joe's head?

A. Right.

Q. And was demanding money from Joe?

A. Right.

* * *

[90] Q. And when – when the man over here found out Joe didn't have any money, what happened?

* * *

A. I think he was getting more, like, pissed off. I guess when Joe was first finished showing him he didn't have anything, he kept, you know, keep cussing at him, telling him to tell him where the money was at. So I guess at that time Joe thought, you know, he was gonna get shot, so he just kind of put his hand up like this and telling him, you know, "Please, please, I don't have [91] anything." And he was telling him, you know, Shut up, bitch. And this, this and that.

* * *

NO. 1108359D

THE STATE OF TEXAS	§	CRIMINAL DISTRICT
	§	COURT
VS.	§	
ERICK DANIEL DAVILA	§	NUMBER ONE IN
	§	AND FOR
	§	
	§	TARRANT COUNTY,
	§	TEXAS

COURT'S CHARGE

MEMBERS OF THE JURY:

The defendant, Erick Daniel Davila, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 6th day of April 2008, in Tarrant County, Texas. To this charge, the defendant has pleaded not guilty.

A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.

"Individual" means a human being who is alive.

"Deadly weapon" means a firearm.

"Firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

You are instructed that no evidence obtained by an officer in violation of any provision of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. Our law permits the arrest of an accused under a warrant when there is sufficient probable cause to support the issuance of the warrant.

By the term "probable cause" is meant where the facts and circumstances within the officer's affidavit, and of which he has reasonably trustworthy information, would justify a reasonable and prudent person in believing that a particular person has committed a crime.

Therefore, bearing in mind the foregoing instruction if you believe that the affidavit for arrest contained sufficient probable cause to support the arrest of Erick Daniel Davila you may consider the arrest of the defendant and all evidence derived from it. If you have a reasonable doubt that the affidavit contained sufficient probable cause to support the arrest of the defendant, you may not consider the arrest of the defendant or any evidence derived from it.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

A person commits an offense of "murder" if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did with the intent to cause serious bodily injury commit an act clearly dangerous to human life that caused the death of an individual, Queshawn Stevenson, by

shooting her with a deadly weapon, to wit: a firearm, then you will find the defendant guilty of the offense of murder of Queshawn Stevenson.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of the murder of Queshawn Stevenson and next consider the offense of murder of Annette Stevenson.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did with the intent to cause serious bodily injury commit an act clearly dangerous to human life that caused the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, then you will find the defendant guilty of the offense of murder of Annette Stevenson.

* * *

/s/ Sharen Wilson
JUDGE SHAREN WILSON
Criminal District Court No. 1
Tarrant County, Texas

VERDICT FORMS

We, the Jury, find the defendant, Erick Daniel Davila, guilty of the offense of capital murder as charged in the Indictment.

/s/ Alfredo Mata
Foreman

For the Judge, a question.

We need a clarification of the capital murder charge.

In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

/s/ Alfredo Mata
JURY FOREMAN

[Alfredo Mata]

STB, 205 pm

JURY NOTE
#2

CASE No. 1108359D

THE STATE OF TEXAS	§	IN CRIMINAL
	§	DISTRICT
VS.	§	
ERICK DANIEL DAVILA	§	COURT NUMBER
	§	ONE
	§	
	§	TARRANT COUNTY,
	§	TEXAS

RESPONSE TO JURY NOTE NO. 2

MEMBERS OF THE JURY:

With regard to the charge of capital murder, the definitions of "intentionally" and "knowingly" on page 1 define the mental states referred to in the application paragraph on the top of page 2. These portions are repeated below:

A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

/s/ Sharen Wilson
Judge Sharen Wilson
Criminal District Court #1

CASE No. 1108359D

THE STATE OF TEXAS	§	IN CRIMINAL
	§	DISTRICT
VS.	§	
ERICK DANIEL DAVILA	§	COURT NUMBER ONE
	§	TARRANT COUNTY,
	§	TEXAS

RESPONSE TO JURY NOTE NO. 2

MEMBERS OF THE JURY:

The Court gives the additional charge on the law as follows:

"A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected."

/s/ Sharen Wilson
Judge Sharen Wilson
Criminal District Court #1

REPORTER'S RECORD

VOLUME 21 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 20th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[8] THOMAS WAYNE BOETCHER,

having been duly sworn, testified as follows:

* * *

[9] Q. Now, in your – in your capacity as a – as a violent crimes homicide investigator, did you have – were you a participant in the interrogation of Erick Davila on 4/8 – April 8th of 2008?

A. Yes, I was.

* * *

Q. And were you present when the Defendant gave three statements regarding the murder he committed at 5701 Anderson?

[10] A. Yes, I was

Q. And at the conclusion of his giving of those three statements, was there something else that you-all wanted to talk to him about?

A. Yes, there was.

Q. And what was that?

A. It was an additional murder case that was unsolved at the time that we wanted to discuss with him.

* * *

[20] Q. Starting with the date, would you read that to the jury, please?

A. (Reading) Date, April the 8th of 2008. Starting time, 8:45.

[21] My name is Erick Davila, and I'm 21 years of age. My date of birth is 4/4/87. I live at 7504 Butterfield Circle, Apartment 707. My phone number is (817) 696-6217. I have completed eleven years of schooling. I can –

It says, I can/cannot read, write and understand the English language.

First paragraph states: On the first part of the month, it was 4 Trey Day, April the 3rd. That's how I remember the day. I went to the convenience store on

East Lancaster by the French Quarters. A friend of mine named Taylor [sic] was with me. We call him T. He hangs around East Lancaster. He wears red. He is not put down with any particular set.

I was driving Nichcole's car, and Taylor was with me on the passenger side. We both went into the store, and when I came out and started up the car, I let my window down on the driver's side, and then this old school man walked up to me. He was a black male about 37 years old. He walked up to me on the driver's side of the car while I was sitting in it. He didn't say nothing to me, he just pulled a pistol out on me and pointed it to my head.

I thought I was going to die in the car. I wait – I waited for Taylor, and he didn't come out. [22] I – I told – I told him what happened, and he was surprised. We hung around the back of the apartments and smoking. We stayed out there all day, and finally went to leave around 4 00 a.m. When we went to the store, we seen the dude talking to the lady and another dude –

MR. GILL: Excuse me, Detective, I believe you skipped a line. Right here, starting right here. Actually, I think you started – you skipped right here. "When we went to leave."

* * *

[23] A. * * *

When we went to leave, we seen the dude talking to the lady and another dude. We were in the front of the store. The store was closed, and I got the strap from

the back of the apartments earlier to get him. I told Tyler to let me off on East Lancaster, and I was going to walk up there.

I went up to the store, and I was walking – as I was walking to him, the guy said to me, what's up? And then he said, What's up G Money? I said, What, and I let him have it. I shot him as he walked towards me, and then I went and got back in the car with. Tyler and went home. I shot him because he had drawn down on me earlier in the day and pointed a gun at my head.

Q. All right. And who is that signed by?

A. The defendant, Erick Davila.

Q. And do you see that person in the courtroom today who signed that statement?

A. Yes, I do.

Q. Would you point him out, please, to the jury and describe what he's wearing today.

A. He's the person to the left of me, and he' s wearing a gray suit and tan shoes.

[24] Q. If I'm in position two here at this table and Ms. Burks is in one, which position is he in?

A. He would be in – you're in two, three and he's . . .

Q. One, two.

A. Oh, I'm sorry, over there? He's in position five to my far left.

MR. GILL: May the record reflect he's identified the Defendant?

THE COURT: It will so reflect.

* * *

[70] TANNA MARTINEZ,

having been previously sworn, testified as follows:

* * *

[78] Q. Okay. So you had paid some attention to the vehicle because of the conversation you were having with Darrell?

A. Yes.

Q. What did you see happen next once the car came out of the Sunrise Apartments?

A. It turned onto Roseland and went towards Norma Street. When it got between Lancaster and Norma Street, it slowed down at the back gate of French Quarters, the exit gate.

Q. And is the French Quarters, was it also called. La Hacienda?

A. Yes, ma'am.

Q. Okay. So what happened next?

A. Then that gentleman walked from the Sunrise apartment complex in the parking lot. He had his head down. Tricky asked him, "What's up?" He didn't say nothing, he didn't raise his head. Tricky said, "Are you good?"

Q. And what does that mean?

[79] A. "Are you looking for anything?"

Q. All right.

A. The gentleman didn't say nothing. He reached behind him like this. I was – I was standing there, and I had my two fingers in Tricky's back pocket. And he said, "Oh, shit, babe, run!" And that's when I seen him pull out a gun. And I wanted to run, and I fell. And I heard pow, pow. And I turned back around, and I seen Tricky run and hit the ground.

Q. And what happened next?

A. He walked over to Tricky and shot him four more times in his back.

Q. And you say – do you see that person in the courtroom that did this?

A. Yes, ma'am (witness crying).

Q. Can you point to him and identify an article of clothing that he's wearing?

A. He's wearing a gray suit and glasses, ma'am.

Q. And if I'm in position number one and you count around the table, what number would he be?

A. Five.

MS. BURKS: Your Honor, may the record reflect the witness has identified the defendant?

THE COURT: It will so reflect.

* * *

REPORTER'S RECORD

VOLUME 2 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 23rd day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[154] MICHAEL THOMPSON,

having been duly sworn, testified as follows:

* * *

BY MR. GILL:

Q. Tell the jury your name, please.

A. Michael Howard Thompson.

Q. And how are you employed?

A. Tarrant County Sheriff's Department detention officer.

* * *

[159] Q. And in C and D tank, were you going to take those two tanks together up to the gym?

A. Yes, sir.

Q. Did you have any people from those two tanks that wanted to go to the gym?

A. Yes, sir.

Q. Do you remember how many inmates you had that wanted to go to the gym?

A. I believe it was a total of about five.

* * *

[161] Q. And did you get the inmates into the gym and locked in there like they were supposed to get in there?

A. Yes.

Q. Okay. And after they got in there, did anything unusual happen?

A. I went to the other gym and started the paperwork, and they got my attention to come back over there.

Q. How did they get your attention?

A. Just yelling through the door crack down the hallway.

* * *

[162] Q. What did you do?

A. I went back to see what they wanted. They said they wanted to go to the other gym because that gym had some water on the floor. It had been raining the night before, if I remember right, and that other gym does typically stay a little drier, so I agreed that they could go to the other gym, at which point I opened the door and they all filed out.

Q. So the basketball gym had some water on the floor?

A. Yes, sir.

* * *

[163] Q. And you said that the other gym – what's the other gym called or designated?

A. That would be the east gym, or the volleyball gym.

Q. The volleyball gym leaks a little bit less?

A. A little bit less.

Q. And so you felt that would be a little drier for them?

A. Yes.

Q. So you had – you had the discretion to allow them to change gyms?

A. Yes, sir. That was our decision.

Q. And so did the inmates go from one gym to the other without incident?

A. Until we got to the other gym.

Q. Then what happened?

A. As the inmates were filing into the gym, just as I thought it was the last one to go in, I started to close the slider door, at which point I see an inmate run back out of the gym to my left, and I saw another inmate run behind him and then I saw a third, and about that time, what I remember is a little sketchy because I [164] started getting hit.

Q. Well, do you see any of those three inmates in the courtroom today that ran by you out of the gym area back out into, the hallway?

A. Yes, sir.

Q. Would you please point him out and describe what he's wearing today'?

A. Wearing a suit.

Q. And where is he – please point to him and describe where he is located in the courtroom.

A. Over here, sir.

Q. If Ms. Burks is in Position 1 and I'm in Position 2 and counting on down the way, what position is he in?

A. He would be Position 5.

MR. GILL: Your Honor, may the record reflect he's identified the defendant?

THE COURT: It will so reflect.

* * *

[165] Q. And you said that you were hit. What were you being hit with while you were out in that hall way area?

A. At that point, I really don't know. I know it was his fist or something. I don't know. I was just being hit from all sides, so I have no idea.

[166] Q. Were they hard blows –

A. They were very hard blows.

Q. And then you said something about being pushed?

A. One – I was pushed into the gym. The door was still open, and I tripped over that and fell into the gym itself.

Q. And what happened after you got back into the gym?

A. Well, I was on the ground, and then I proceeded to get hit more, kicked in the head. I felt my shirt being ripped off of me. I felt my wallet being taken

out of my back pocket. I heard my keys being removed from my holster, and I proceeded to get kicked and beaten again quite a few times.

Q. And were the inmates saying anything to you while this was going on?

A. One of them said, we're going to kill you, and then said, where's the escape route, how do you get out of here. I told them there wasn't one. They weren't too happy with that answer. I was hit some more times, and they already had my keys. I knew I couldn't regain control, so I knew if I sent them down to the fire escape, that would give me time to get some help, knowing that they could not get out.

* * *

[167] Q. After you told them to head for that fire escape, what happened next?

A. They left. I managed to get myself up off the floor, walked back into – out of the gym, back into the hallway. That's when I saw my partner. She was laying [168] face down in the hallway bleeding.

* * *

Q. And what kind of condition were you in?

A. Bleeding very badly. I had – unknown to me at the time, but I had a very large cut here on my left cheek and a cut above my left eye and a big knot over [169] here on my left side of my head.

Q. Now, you had mentioned that you had seen your partner up on 2-8?

A. Yes, sir.

Q. And I don' t remember if you told us her name.

A. Otterson, O-T-T-E-R-S-O-N, first name, Teresa.

Q. And you said she was bleeding –

A. Yes, Sir.

Q. – as well?

Tell the jury exactly what the condition she was in.

A. When I saw her that time, she was prone face down, bleeding very profusely from her head, and there was at ready a pool of blood on the floor, so I don't know how long she had been there.

* * *

[173] Q. What does that show?

A. That's the cut on my left cheek.

Q. Just a long – probably six-inch long laceration or so?

[174] A. Yes, sir. I believe it took 11 stitches.

Q. It took 11 stitches?

A. Yes, sir.

Q. Do you still carry a scar from that today?

A. Yes, I do.

MR. GILL: Your Honor, can he turn and show the jury where that scar is located?

THE COURT: Yes.

Thank you.

Q. (BY MR. GILL) And 289?

A. Yes, Sir.

Q. What does that show?

A. Some sort of an abrasion on my right cheek, it would appear.

Q. And your right eye is blackened?

A. Yes, sir.

Q. You have abrasions to your nose, your cheek?

A. Yes, sir.

Q. 290?

A. Yes, sir.

Q. What does that show?

A. Some cuts in my scalp, and looks like on my right – part of my forehead.

Q. So basically you were just struck all over your – all over your head?

[175] A. Yes, sir.

Q. And 291?

A. Yes, sir.

Q. Tell the jury what that shows, please.

A. Some markings on my back. I don't remember receiving them, but apparently I did.

Q. That's not how your back normally looks?

A. Not normally, no, sir.

Q. You have quite a few abrasions and some bruises on your back?

A. Yes, sir.

* * *

REPORTER'S RECORD

VOLUME 23 OF 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 24th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[108] JULIAN TORRES,

having been duly sworn, testified as follows:

* * *

[113] Q. And did all five inmates enter the – the gym –

A. Yes.

Q. – that gym?

A. Yes, sir.

Q. And after y'all got – were put in the gym, what happened next?

A. Me and Christopher Shaw went and got – got the handball and were fixin' to start playing handball. The other three gentlemen, they – they grouped up in the corner and just were talking over there amongst they selves.

* * *

Q. Then what happened?

A. Then the – I don' t know. At that time they requested to get moved out of that gym to the officer, and the officer moved us to another area of the gym.

Q. What – what – what was the reason they made a request to move out of that area?

A. They said that the floor was wet or something.

Q. And so did the officer come and take care of that?

[114] A. Yes, sir.

Q. And what did he do?

A. He came and told us to come on, he was gonna put us in the other side.

* * *

Q. And did the officer put y'all in the gym over there?

A. Yeah, well, me and Christopher Shaw made it into the gym over there.

Q. And what happened with the other three inmates?

A. They attempted to take over the – the facility or the – with the officer at that time.

Q. How did they do that?

A. By beating him and stabbing him.

* * *

[115] Q. * * *

Which three inmates were involved in the beating of the officer?

A. The – Erick Davila, Hurd and Edwards.

Q. And were all three of them beating the officer?

A. Yes.

Q. And who – who appeared to be doing what?

A. They all just been forcefully trying to drag him into the – into the rec area. And the officer was just trying to hold on, and you know, they were just beating him.

Q. And where on the officer's body were they beating him?

A. Throughout the face, head, body.

Q. And you said that – that they were also stabbing him?

A. Yes.

* * *

[116] Q. And what happened once he got into the rec area?

A. They slammed him on the floor, put his arms out in front of him, started kicking him, hitting him, stabbing him trying to rip his uniform off.

Q. And during – during this period of time, were they saying anything to the officer?

A. Just that, I'll kill you, and you know, you don't know me, you don't know what I'm in here for. I [117] have nothing to lose. How do you get out of this building?

* * *

Q. In particular, did you hear this man over here, Truman, say any particular thing to that officer?

A. Told him he didn't have nothing to lose, that – that he – that he didn't – he said, You don't know what I'm in here for, I don't got nothing to lose, I'll fucking kill you.

Excuse my language.

Q. And did they continue to beat the officer?

A. Yes.

Q. And where – at this point, where was the beating taking place?

A. In the rec area on the floor.

Q. How long did that continue?

A. For a good little while.

* * *

[118] Q. At some point did the beating on the officer discontinue?

A. Well, yeah, it stopped 'cause Erick Davila was running back and forth trying to open up the door. And then the other one, Hurd, went out and tried to take off his – he was trying to take off the officer's uniform. And Edwards was just stomping on his head after he was holding his arms out saying, how the heck – how the fuck are you gonna get out this building?

* * *

[119] Q. At some point did they all leave the gym area?

A. Yes.

Q. And what happened after they all left the gym area?

A. Well, the officer attempted to get up, he got up, he staggered out, he went – he went out in the – in the hallway. We heard something, some commotion, but then we heard, like – like – like something fall, something heavy. We went and looked out, and we seen Ms.

Otterson, another rec officer, that was laying on the floor with what appeared to be a stab wound to her stomach asking us to help. She was all bloody, and you know, her hair was all messed up in a way that she wouldn't present herself.

* * *

CAUSE NO. 76,105

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

ERICK DANIEL DAVILA
Appellant
VS.
THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

Appeal of Cause No. 1108359D
Out of Criminal District Court Number One
of Tarrant County, Texas
The Hon. Sharen Wilson, Presiding

ORAL ARGUMENT IS NOT REQUESTED

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* * *

APPELLANT'S POINTS OF ERROR (ISSUES PRESENTED)

POINT OF ERROR ONE

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR THE OFFENSE OF CAPITAL MURDER BECAUSE THE STATE FAILED TO PROVE THE REQUISITE ELEMENT OF INTENT. ***(Record in its Entirety).***

POINT OF ERROR TWO

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***CLEWIS v STATE, 922 S.W. 2nd 126 (Tex. Crim. App. 1996). (Record in its Entirety).***

POINT OF ERROR THREE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)*** IN VIOLATION OF ***THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XVII-175-208, XXIX-SE #117, XXXIV-DE #89, #102).***

POINT OF ERROR FOUR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)*** IN VIOLATION OF ***ART. I, SEC. 9 OF THE TEXAS CONSTITUTION AND ARTS. 1.06, 15.04, 15.05, AND 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE (VERNON 1965, 1987). (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XVII-175-208, XXIX-SE #117, XXIV-DE #89, #102).***

POINT OF ERROR FIVE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN EXTRANEOUS MURDER OFFENSE PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)*** **IN VIOLATION OF *THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XXI-8-20, XXIX-SE #117, XXXIV-DE #89, #102).***

POINT OF ERROR SIX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN

EXTRANEOUS MURDER OFFENSE PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978)*** **IN VIOLATION OF** ***ART. I, SEC. 9 OF THE TEXAS CONSTITUTION AND ARTS. 106, 15.04, 15.05, AND 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE (VERNON 1965, 1987). (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XXI-8-20, XXIX-SE #117, XXXIV-DE #89, #102).***

POINT OF ERROR SEVEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR EIGHT

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***ARTICLE 1, SECTION 10 OF THE TEXAS CONSTITUTION AND ARTICLE 38.22 OF THE TEXAS CODE OF CRIMINAL PROCEDURE ANN. (VERNON 2001). (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR NINE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN EXTRANEOUS MURDER OFFENSE PURSUANT TO ***THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR TEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN EXTRANEOUS MURDER OFFENSE PURSUANT TO ***ARTICLE 1, SECTION 10 OF THE TEXAS CONSTITUTION AND ARTICLE 38.22 OF THE TEXAS CODE OF CRIMINAL PROCEDURE ANN. (VERNON 2001). (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR ELEVEN

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INCLUDE AN INSTRUCTION IN THE COURT'S CHARGE ON THE VOLUNTARINESS OF APPELLANT'S THREE STATEMENTS PERTAINING TO THIS OFFENSE PURSUANT TO ***ART. 38.23 TEX CRIM. PROC. CODE ANN. (VERNON 1987). (RR. XIX-137-58)***.

POINT OF ERROR TWELVE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO PRECLUDE THE DEATH PENALTY AS A SENTENCING OPINION AND DECLARE ***TEX CRIM. PROC. CODE ANN. art. 37.071 (Vernon 2005)*** UNCONSTITUTIONAL ON THE GROUND THAT TEXAS LAW ALLOWS FOR A DEATH SENTENCE WITHOUT GRAND JURY REVIEW OF THE PUNISHMENT SPECIAL ISSUES. ***(CR. I-67-71)***.

POINT OF ERROR THIRTEEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S FEDERAL CONSTITUTION BASED OBJECTION TO THE SO CALLED "10-12" RULE IN TEXAS' DEATH PENALTY SCHEME. ***(CR. I-124-55)***.

POINT OF ERROR FOURTEEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO INSTRUCT THE JURY THAT THE SENTENCING BURDEN OF PROOF ON THE MITIGATION SPECIAL ISSUE LIES WITH THE STATE. ***(CR. I-74-83, IX-1936-37)***.

* * *

SUMMARY OF APPELLANT'S ARGUMENTS

The following is a summary of Appellant's points of error on appeal pursuant to ***Rule 38.1(g) of the Texas Rules of Appellate Procedure:***

POINT OF ERROR ONE:

Appellant was convicted of the offense of capital murder pursuant to ***sec. 19.03(7)(A) Tex. Penal Code Ann. (Vernon 2005)***. The evidence is legally insufficient to support his conviction because the prosecution failed to prove the requisite element that Appellant had the specific intent to kill two individuals. The factual scenario presented by the State was that Appellant, a Truman Street Blood, had a grudge against Jerry Stevenson, a Polywood Crip. The evidence in the record shows that Appellant's actions were consistent with the intent to kill Jerry Stevenson. Though two individuals were killed, the evidence in the record fails to show that Appellant had the specific intent to kill two people. Because the State failed to prove this element beyond a reasonable doubt the evidence is legally insufficient to support Appellant's conviction for the offense of capital murder.

POINT OF ERROR TWO:

The evidence is factually insufficient to support the jury's verdict for capital murder for the same reason as espoused in point of error one. The evidence, viewed in a neutral light, shows that Appellant had the specific intent to kill only Jerry Stevenson, and no one

else. The great weight and preponderance of the evidence overwhelmingly supports this theory. As a result, the evidence supporting Appellant's conviction for capital murder under ***sec. 19.03(7)(A) Tex. Penal Code Ann. (Vernon 2005)*** is too weak, beyond a reasonable doubt, rendering his verdict of guilt clearly wrong and unjust. Therefore, the evidence is factually insufficient to support the Judgment against Appellant for the offense of capital murder.

* * *

POINT OF ERROR ONE

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR THE OFFENSE OF CAPITAL MURDER BECAUSE THE STATE FAILED TO PROVE THE REQUISITE ELEMENT OF INTENT. ***(Record in its Entirety).***

ARGUMENT AND AUTHORITIES

The United States Supreme Court in ***Jackson v Virginia, supra***, held that in a legal sufficiency of the evidence analysis the appellate court is required to view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. ***Jackson v Virginia, 443 U.S. at 319, 99 S. Ct. 2789; Laster v State, supra at 517; Bigon v State, 252 S.W. 3d 360, 366 (Tex Crim. App. 2008); Weaver v State, 265 S.W. 3d 523***

530 (Tex App. – Houston [1st Dist.] 2008, pet. ref'd). This Court relied upon the federal constitutional precedent established in ***Jackson v Virginia*** when it decided the cases of ***Benson v State, 661 S. W. 2d 708 (Tex Crim. App. 1982) (opinion on the State's second motion for rehearing) cert. denied, 467 U.S. 1219, 104 S. Ct. 2667 (1984) and Boozer v State, 717 S.W. 2d 608 (Tex Crim. App. 1984).*** In ***Benson*** this Court held that when the court's charge was correct for the theory of the case presented by the State, then the legal sufficiency of the evidence should be viewed by comparing the evidence to the indictment as incorporated into the court's charge to the jury. ***Benson at 715***. Because the State had failed to object to an unnecessary narrowing of an element in the court's charge in ***Benson***, this Court concluded that the evidence was legally insufficient to support the appellant's conviction. ***Benson at 715-16***. The same conclusion was reached in ***Boozer*** when the State neglected to object to the trial court's erroneous instruction regarding accomplice witness testimony. Comparing the State's evidence to the court's charge, the ***Boozer*** court was once again constrained to hold the evidence insufficient to support the jury's verdict. ***Boozer at 610-12***.

Dissatisfied with its analysis in the ***Benson/Boozer*** line of cases, this Court reexamined its standard of review in legal sufficiency of the evidence questions in ***Malik v State, 953 S.W. 2d 234 (Tex Crim. App. 1997).*** Reasoning that its holdings in the ***Benson/Boozer*** line of cases and their resulting progeny were

not prerequisites to the federal standard espoused in ***Jackson v Virginia*** ***(Malik at 236-40)***, the ***Malik*** court redefined the appellate standard of review as follows:

> The Benson/Boozer rule is based upon a misinterpretation of federal constitutional precedent, results in complex and inconsistent standards for reviewing sufficiency of the evidence, and is fundamentally at odds with the purpose behind the *Jackson* standard of sufficiency review. Therefore, we overrule the *Benson/Boozer* line of cases and abolish the standard of sufficiency review that they formulated. No longer shall sufficiency of the evidence be measured by the jury charge actually given. Nevertheless, we recognize that measuring sufficiency by the indictment is an inadequate substitute because some important issues relating to sufficiency – e.g. the law of parties and the law of transferred intent – are not contained in the indictment. [citations omitted]. Hence, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not necessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. [footnote omitted]. This standard can uniformly be applied to all trials, whether to the bench or to the jury, whether or not the

> indictment is facially complete, and regardless of the specific wording of the jury charge actually given. Moreover, the standard we formulate today ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime rather than a mere error in the jury charge submitted.
>
> ***Malik* at 239-40.**

***See, Villarreal v State*, 286 S.W. 3d 321, 327 (Tex. Crim. App. 2009) cert. denied, ___ U.S. ___, 130 S. Ct. 515 (2009); *Hardy v State*, 281 S.W. 3d 414, 421 (Tex Crim. App. 2009); *Grissam v State*, 267 S.W. 3d 39, 40 (Tex. Crim. App. 2008) aff'd on remand, 285 S.W. 3d 532 (Tex App. – Fort Worth 2009, pet. ref'd); *Mantooth v State*, 269 S.W. 3d 68, 76 (Tex App. – Texarkana 2008, no pet.).**

When measuring the evidence against a hypothetically correct jury charge, ***Malik*** ensures that the appellate court may not reevaluate the weight and credibility of the evidence and substitute its judgment for that of the fact finder. ***Lancon v State*, 253 S.W. 3d 699, 705 (Tex. Crim. App. 2008); *Venegas-Ortiz v State*, No. 8-08-063-CR, 2010 Tex App. LEXIS 2393, at *7 (Tex App. – El Paso March 31, 2010, no pet.) (not designated for publication); *Hartsfield v State*, 305 S.W. 3d 859, 862-63 (Tex App. – Texarkana 2010, no pet.).** Deference must be accorded to the responsibility of the trier of facts to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic to ultimate

facts. ***Williams v State, 235 S.W. 3d 742, 750 (Tex Crim. App. 2007); Hooper v State, 214 S.W. 3d 9, 13 (Tex Crim. App. 2007) aff'd on remand, 255 S.W. 3d 262 (Tex App. – Waco 2008, pet. ref'd); Jackson v State, 270 S.W. 3d 649, 652-53, 656 (Tex App. – Fort Worth 2008, pet. ref'd).***

In this case Appellant was convicted of causing the deaths of two individuals during the same criminal transaction. Capital murder is a result-of-conduct oriented offense. This means that the offense is defined by the defendant's objective to produce, or a substantial certainty of producing a specified result, which in Appellant's case, is the deaths of Queshawn and Annette Stevenson. ***See, Roberts v State, 273 S.W. 3d 322, 329 (Tex Crim. App. 2008). See also, Schroeder v State, 123 S.W. 3d 398, 400-01 (Tex Crim. App. 2003); Guzman v State, 20 S.W. 3d 237, 240 (Tex App. – Dallas 2000) pet. granted and rev'd on other grounds, 85 S.W. 3d 242 (Tex Crim. App. 2002)***. Due process mandates that the prosecution prove each and every element of the specified offense. ***In re Winship, 25 L.Ed. 2d 368, 373-74 (1970). See also, Hughen v State, 265 S. W. 3d 473, 484-85 (Tex App. – Texarkana 2008) pet. granted and aff'd on other grounds, 297 S.W. 3d 330 (Tex. Crim. App. 2009); Tijerina v State, 264 S.W.3d 320, 322-23 (Tex. App. – San Antonio 2008, pet. ref'd).*** The evidence is legally insufficient to uphold Appellant's conviction for this capital murder offense because the State failed to meet its burden of proof on the element of specific intent to kill two individuals.

This very issue, the specific intent to kill two or more persons during the same criminal transaction, was the gravamen of this Court's decision in ***Roberts***, ***supra***. Specifically, the ***Roberts*** Court was called upon to address the issue of whether the doctrine of transferred intent under ***sec. 6.04(b)(2) Tex. Penal Code Ann. (Vernon 1994)*** could be utilized by the prosecution to prove the requisite element of specific intent under ***sec. 19.03(7)(A) Tex. Penal Code Ann. (Vernon 2005)***. The appellant in ***Roberts*** was convicted of the capital murder of a woman and her unborn fetus. The evidence was undisputed that at the time of the offense the appellant was unaware of the woman's pregnancy. At the time of the shooting the woman's two-year-old child was present but miraculously survived the attack, unharmed. ***Roberts at 324-25***.

In holding that the doctrine of transferred intent could not be utilized to support the specific intent element under ***sec. 19.03(7)(A)***, and thus sustain the appellant's capital murder conviction, overruling that portion of ***Norris v State, 902 S.W. 2d 428 (Tex Crim. App. 1995)*** that decided the contrary, Judge Johnson, the author of *Roberts* explained:

> This conclusion [that ***sec. 6.04(b)(2)*** can be applied to ***sec. 19.03(7)(A)***] is at odds with the *Norris* Court's recognition that, for capital murder pursuant to Section 19.03(a)(6)(A),[4] each death must be intentional or knowing –

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[4] Obviously this statute predates the present one.

there must be a discrete "specific intent to kill" as to each death. A classic example of proper application of transferred intent is the act of firing at an intended victim while that person is in a group of other persons. If the intended person is killed, the offense is murder. If a different person in the group is killed, the offense is murder pursuant to TEX. PENAL CODE sec. 6.04(b)(2): "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: a *different* person or property was injured, harmed, or otherwise affected." (Emphasis added). In either case, there was one intent to kill and one resulting death.

If both persons are killed, we cannot use transferred intent to charge capital murder based on the death of the unintended victim, as that would require using a single intent to kill to support the requirement of two intentional and knowing deaths. Further, while sec. 6.04 permits the use of transferred intent if a *different* person is harmed; [footnote omitted] such use is not authorized if the intended victim is also killed, as that would permit one intent to kill to support more than one death. [footnote omitted] This is the fallacy of *Norris;* it permits the intent to cause one intentional or knowing death to support two deaths, one intentional and knowing, the other unintentional. We overrule *Norris* to the extent that it allows such use. Transferred intent may be used as to a second death to support a charge

> of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane. This resolution comports with *Aguirre v State*, 732 S.W. 2d 320 (Tex. Crim. App. 1982), but does not violate the plain language of sec. 6.04(b)(2) or sec. 19.03(a)(7).
>
> ***Roberts* at 330-31.**

The ***Roberts*** Court further reasoned that even if the appellant had formed an intent to kill the woman's daughter, and such intent could have been proven by the State, it would not have been sufficient to support his conviction on a legal sufficiency of the evidence challenge because no act of appellant toward the two-year-old would have resulted in the death of the embryo. ***Roberts* at 331**. In concluding that there was insufficient evidence in the record to prove that the appellant had the requisite intent to kill the woman's fetus Judge Johnson opined:

> . . . Appellant intended to kill A, and did so. If he is to be charged with also intentionally and knowingly killing a second person, in this case the embryo, by killing the mother, there must be a separate specific intent to do so. *See Lawrence* . . . [240 S.W. 3d 912 (Tex. Crim. App. 2007] *supra*] (shot pregnant girlfriend with

> specific intent to kill the embryo). It is undisputed that appellant did not know that Ms. Ramirez [decedent] was pregnant. Lacking knowledge of the embryo's existence, appellant could not form a separate specific intent to kill the embryo, as is required by statute.
>
> ***Roberts* at 331**

Just as the evidence was legally insufficient to support the appellant's capital murder conviction in ***Roberts***, on the element of specific intent, the same is true in the case at bar. The motive developed at trial to explain Appellant's actions, and the only scenario that passes the common sense test, was that Appellant, a Truman Street Blood, had a grudge against Jerry Stevenson, a member of the Polywood Crips. Three weeks before this offense Jerry and Appellant had been involved in a separate verbal altercation, again presumably due to their separate gang affiliations. ***(RR. XIX-61-80)***.

Throughout the trial the prosecution enthusiastically, as well as continuously, emphasized to the jury the bitter enmity between the Bloods and the Crips. ***(RR. XVI-136-38, 146-70; XVIII-31-70)***. The State's eye witness Eghosa Ogierumwense watched as Appellant specifically targeted only Jerry Stevenson with his laser sight. ***(RR. XIV-138, 144-45)***. One of the wounds sustained by Annette Stevenson was intermediate, meaning that it had struck other targets before entering her body. ***(RR-XVIII-265-73)***. The weapon utilized in this offense was described as high-powered. ***(RR. XVIII-158-59)***. With the ammunition used in it the

muzzle velocity was great. ***(RR. XVIII-158-59)***. Extrapolating from the testimony of the forensic firearms examiner, the bullets used in the rifle at the approximate range where Appellant was standing were capable of traveling through outside walls. Additional evidence developed at trial revealed that Appellant's far away vision was exceedingly poor. ***(RR. XIX-96-102)***.

It is apparent, in light of the State's developed motive for this shooting, that Appellant's sole intent was to kill Jerry Stevenson. The gangland dispute was with him. Appellant aimed his laser sight at Jerry alone. When Jerry stepped inside the residence before Appellant could get off his initial shot, Appellant fired solely at him, expecting his bullets to penetrate the outside wall and strike Jerry. Though motive itself is not an element that the prosecution is required to prove "evidence of motive is one kind of evidence [that aids in] establishing proof of an alleged offense. ***See, Crane v State, 786 S.W. 2d 338, 349-50 (Tex Crim. App. 1990); Pollard v State, 255 S.W. 3d 184, 188 (Tex App. – San Antonio 2008) pet granted and aff'd, 277 S.W. 3d 25 (Tex Crim. App. 2009)***. Appellant had no dispute with any other person present at the party. He fired at Jerry; unfortunately, he was a bad shot and two innocent people were killed by accident. This is the exact fact scenario which this Court in ***Roberts*** held to be insufficient to support a capital murder conviction under ***19.03(7)(A)***.

Because the evidence is legally insufficient to support the jury's conviction for capital murder, Appellant

respectfully prays that this Honorable Court reverse the trial court's Judgment and Sentence of Death and render a verdict of acquittal. ***See, Burks v United States, 437 U.S. 1, 98 S. Ct. 2141(1978) and Greene v Massey, 437 U.S. 19, 98 S. Ct. 2151 (1978).***

* * *

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UNDER TX R RAP RULE 77.3,
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OPINION
Do Not Publish

Court of Criminal Appeals of Texas.

Erick Daniel DAVILA, Appellant
v.
The STATE of Texas.

No. AP-76,105.
|
Jan. 26, 2011.

On Direct Appeal from Cause No. 1108359D in Criminal District Court Number One, Tarrant County.

Attorneys and Law Firms

Mary B. Thornton, for Erick Daniel Davila.

OPINION

COCHRAN, J., delivered the opinion of the unanimous Court.

Appellant was convicted of capital murder for shooting a five-year-old child and her grandmother during the same transaction.[1] Based upon the jury's

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[1] TEX. PENAL CODE § 19.03(a)(7)(A).

answers to the special punishment issues, the trial court sentenced appellant to death. On direct appeal to this Court, appellant raises fourteen points of error, including the sufficiency of the evidence to support his conviction. After reviewing all of his points of error, we find them to be without Davila Page 2 merit. Therefore, we affirm the trial court's judgment and sentence of death.

Factual Background

On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth.[2] Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car."[3] And then Cashmonae heard her

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[2] This neighborhood was known for gang-related violence, frequently between the Bloods, who used red as their "color," and the Crips, who used blue.

[3] Jerry later testified that he thought the rifle was an AK-47; in fact, it was an SKS. The two rifles are similar in appearance and function.

grandmother, Annette Stevenson, say, "They trying to find trouble."

A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch.[4] He kept shooting at them as the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.

Meanwhile, just a couple of blocks away, Kent Reed was attending a different birthday party at his mother-in-law's home on Luther Court. While he was barbecuing, Kent saw a black car with customized vents pull up and stop. A man with distinctive-looking

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[4] Jerry Stevenson testified that he saw the gunman, dressed all in black, shooting at them, so he grabbed his son's hand, pulled him into the house, and threw him into a corner to protect him as he saw his mother stagger through the door and walk toward her bedroom. When Jerry saw that his daughter, Queshawn, was not inside, he ran to the door, and saw her lying on the front porch. He ran out, picked her up, and carried her back inside.

ears[5] and slashes in his eyebrows got out on the driver's side. It was appellant.[6] He was wearing a hoodie, black jeans, a baseball cap turned backwards, and red and black tennis shoes. Appellant was carrying a big gun with a red beam shining from it onto the ground. He knocked on the next-door neighbor's door, but no one answered, so he walked down a trail between the buildings toward the field. The passenger in the black car slid over into the driver's seat and sped off.

A few minutes later, Kent heard a series of distinctive shots, a pause, and then several more shots. He gave a written statement to the police that evening in which he described the car and the man that he had seen. The next day, Kent picked appellant out of a photo line-up.

Fifteen-year-old Eghosa, along with several of his friends, was at the same party with Kent. He noticed the man with a long rifle and a red-dot beam and, sensing something peculiar,[7] he and two friends followed the man as he walked between the buildings. Eghosa saw the man walk through the field, stand next to an air conditioning unit beside one building, and then

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[5] Appellant had a very large diamond-looking earring as well as a large silver bolt in his earlobe.

[6] Kent's wife, Arlette, also saw the black car and knew it was a Mazda. She saw appellant and could identify him by the distinctive earrings in his ears.

[7] The rest of the party-goers were also apprehensive at the sight of this silent man in black toting a big rifle with an infrared scope. They went inside the home on Luther Court.

take aim on the house across the street. He saw the man train the red beam from the rifle on Jerry Stevenson[8] ("Big Boy Dooney"), but when "Dooney" went inside, he moved the beam to the windows of the house. Eghosa saw "Granny" – Annette Stevenson – and the kids playing on the Stevenson's porch. Once "Dooney" went inside, the man started firing the gun. He trained the red beam on "Granny" who tried to shoo the children inside. Then Eghosa saw "Granny" get shot a couple of times; he could see the bullets hitting her as she fell in the doorway. The man shot about nine times while he was standing at the corner, then he ran to the middle of the street and shot several more times. The same car that Eghosa had seen the shooter get out of on Luther Court came around the corner and stopped. The shooter jumped into the driver's seat and then sped off. Eghosa said that the man appeared frustrated when he failed to hit "Dooney," and he lowered the rifle, but then raised it again and started firing once more.[9]

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[8] Jerry Stevenson testified that, about a week before the murders, he had intervened in what may have been a gang-related quarrel in front of his mother's home between some Bloods and his nephew, Gary, who was visiting. Jerry agreed that the apartment complex was known as Blood territory, but that his mother's house might have been identified as "a Crip house," even though no one at her home actually was a Crip member. One of appellant's fellow gang members testified that Jerry or "Dooney" was "never no threat" to the Bloods, so nobody had ever bothered him or his family members.

[9] Numerous other witnesses from the neighborhood also heard and saw the shooting and described appellant's actions as did Eghosa.

By the time the first police officer arrived, it was a chaotic scene. There was a dead woman – Annette Stevenson – in the back bedroom, a seriously injured child – Queshawn – on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Nichcole Blackwell testified that she and appellant were living together in April of 2008. She said that appellant had a "Truman Street Bloods" tattoo on his chest and he liked to wear the color red. He had a black rifle, but Nichcole told him to take it away because she didn't like guns. On Sunday, April 6th, appellant drove off in Nichcole's black Mazda 626 at about 3:00 p.m. He was wearing a black shirt and either red or black pants. He returned about 8:00 or 9:00 p.m., left again, returning around 11:00 p.m., and then left once more around midnight and finally returned around 4:00 a.m. and went to sleep. The next day Nichcole learned that her car might have been involved in the murders, so she called the police who asked her to come down and give them a statement.

Based upon the police investigation, Detective Brent Johnson obtained a warrant for appellant's arrest shortly after midnight on April 8th. That

afternoon, appellant was arrested and, over the course of seven hours, gave four written statements to the police. In his third statement,[10] appellant said that he and his friend Garfield were driving around in Nichcole's black Mazda when he decided that we can have a shoot em up. I told [Garfield] I was gonna drive to the back and to let me out of the car and for him to leave. I had the AK with me, but I didn't have the clip, so I had to go to Ms. Sheilas to get the clip. We went around to the back of the apartments and the AK has a scope and a red beam on it. I went up to Ms. Sheilas door carrying the AK. A little boy answered the door and I went in and got the clip that was right under the sofa. I got the clip and put it in the AK. When I went back outside I went through the field where the shooting happened. Ms. Sheilas house is kind of like a trap. That is where everybody goes to keep their guns and their weed.

> . . . When I told Garfield it was my hood and we were going to have a shoot em up, and I was going to scare them and let them know that I had a gun. . . . I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude was in the middle of the street. The other 3 were on the porch. I wasn't going to give them a chance to get a gun. Garfield had stopped my car in the middle of Anderson and I thought they were going to start shoot up my car. I only let off ten rounds and

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[10] Appellant's fourth statement dealt with an extraneous murder, evidence of which was admitted during the punishment phase of trial.

> I had 21 in the clip. I was trying to get the guys on the porch and I was trying to get the fat dude. I wasn't aiming at the kids or the woman and don't know where the woman came from. I don't know the fat dudes name, but I know what he looks like, so I recognized his face.[11]

Appellant also explained that he had given his SKS semi-automatic rifle to "Terminal," a fellow Bloods gang member, the day after the murders. Terminal later led police to appellant's rifle, which had been covered in a dark shirt and left in a wooded area. The SKS had a folding stock, an infrared scope, and a bayonet affixed to it.

Sufficiency of the Evidence

In his first and second points of error, appellant claims that the evidence is legally and factually insufficient[12] to support his conviction for intentionally or knowingly causing the death of two people. He argues that he intended to kill only Jerry Stevenson and therefore his intent to kill Jerry cannot be transferred to the deaths of both Annette and Queshawn.

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[11] This excerpt is taken verbatim from appellant's written statement without change of syntax, spelling, or punctuation.

[12] After appellant had filed his Brief in this case, we overruled the *Clewis* line of cases regarding factual sufficiency in *Brooks v. State*, 323 S.W.3d 893 (Tex.Crim.App.2010). We held that the sole standard for measuring evidentiary sufficiency of the evidence is that set out by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Under Texas law, "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected."[13] This concept is known as the doctrine of transferred intent. The issue of transferred intent is raised when the evidence shows that a defendant intends to harm one person but actually harms a different person instead.[14] The rationale for the rule is straightforward: murder requires the killing of another human being, but not of a particular human being.[15] The defendant wanted to kill one or more human beings; the fact that he did not manage to kill the very same persons that he intended to kill, does not exculpate him or diminish his criminal responsibility.

Appellant argues that the evidence shows that he intended to kill only one person, thus his one criminal intent can be transferred to only one of the victims, not

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[13] TEX. PENAL CODE § 6.04(b)(2).

[14] *See Manrique v. State*, 994 S.W.2d 640, 647 (Tex.Crim.App.1999) (McCormick, P.J., concurring); *Pettigrew v. State*, 999 S.W.2d 810, 812-13 (Tex.App.-Tyler 1999, no pet.) (affirming murder conviction of defendant who shot at a rival gang resulting in an innocent bystander being shot by a member of that rival gang); *see also Dowden v. State*, 758 S.W.2d 264, 272-73 (Tex.Crim.App.1988) (sufficient evidence supported capital-murder conviction where defendant initiated shoot-out in police station that resulted in friendly-fire death of different officer).

[15] *See generally*, Michael Bohlander, *Transferred Malice and Transferred Defenses: A Critique of the Traditional Doctrine and Arguments for a Change in Paradigm*, 13 New Crim. L.R. 555, 556 (2010).

both. In his Brief, appellant relies primarily upon our reasoning in a non-death-penalty capital-murder decision, *Roberts v. State*.[16] That case, however, is both factually and legally distinguishable from the present one. In *Roberts*, the evidence showed that the defendant intentionally or knowingly shot and killed Virginia Ramirez. He also caused the death of Ms. Ramirez's eight-to-nine-week-old fetus. The court of appeals had held that the defendant's intent to cause the death of Ms. Ramirez could also transfer over to the death of her unborn fetus.[17] This Court reversed the defendant's capital-murder conviction for intentionally killing two people.[18] Although there was ample evidence in the record that the defendant intended to cause Ms. Ramirez's death, there was no evidence that the defendant also intended to cause the death of her fetus because there was no evidence that he (or anyone else) knew that Ms. Ramirez was pregnant at the time of the murder. We explained,

> Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, *e.g.*, with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob, and

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[16] 273 S.W.3d 322 (Tex.Crim.App.2008).

[17] *Id.* at 326-27.

[18] *Id.* at 327.

> being a bad shot, the defendant killed Mary and Jane.[19]

That latter scenario is precisely what happened in this case. The evidence shows that appellant intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As appellant himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.[20] There is ample evidence in the record to support the jury's verdict that appellant intended to cause more than one death in his "shoot em up" attack. That evidence includes the following:

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[19] *Id.* at 331.

[20] *Id.; see, e.g., Pettigrew*, 999 S.W.2d at 812-13; *Grayson v. State*, No. 14-04-00226-CR, 2005 WL 1669537 *1-3 (Tex.App.-Houston [14th Dist.] July 14, 2005, pet. ref'd) (not designated for publication) (evidence sufficient to support murder conviction during neighborhood "gun battle" confrontation under transferred intent even though no witness actually saw defendant shoot victim); *Lawrence v. State*, No. 09-03-215-CR, 2005 WL 550705 *1-2 (Tex.App. – Beaumont March 9, 2005, pet. stricken) (not designated for publication) (murder conviction upheld; evidence sufficient under doctrine of transferred intent when evidence showed defendant intended to shoot Thomas, but hit Price instead); *Castillo v. State*, No. 07-00-0365-CR, 2001 WL 1044895 *1-2 (Tex.App. – Amarillo 2001, no pet.) (not designated for publication) (evidence sufficient to support defendant's "drive-by" murder conviction under transferred intent when evidence showed that he shot at pedestrian who had shouted at him, but hit and killed another person instead).

(1) Appellant gave a written statement explaining that he intended to "get the fat dude" and who he mistakenly thought were three guys on the porch;[21]

(2) Cashmonae testified (as did other witnesses) that appellant aimed the "red dot" at "different parts of the house" and at different persons;

(3) Appellant used a high-powered SKS semi-automatic rifle with an infrared beam to fire between ten to fifteen bullets into the group of women and children on Ms. Stevenson's front porch;

(4) Appellant fired a burst of bullets from one location across the street, then paused as he ran to the middle of the street and fired a second burst of bullets;

(5) Eghosa said that appellant looked "frustrated" after the first burst of fire when Jerry or "Dooney" had escaped into the house, so appellant moved and then fired a second burst at the remaining women and children;

(6) Appellant used a rifle with an infra-red scope that would give him greater precision in shooting at what he intended to hit;

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[21] Although appellant claims, in a separate point of error, that his confession should not have been admitted, in reviewing the sufficiency of evidence, we consider both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App.2007) (in conducting legal sufficiency review, courts assess "all of the evidence," including evidence that was improperly admitted).

(7) His semi-automatic SKS required him to pull the trigger each time he intended to shoot; thus he intended to shoot his targets at least ten to fifteen different times;

(8) Expert testimony that appellant's choice of bullets, high-powered hollow-point bullets, was consistent with a shooter who wants to cause maximum damage or death to his intended target.

Viewed in the light most favorable to the verdict under the appropriate *Jackson* standard,[22] we conclude that the evidence is sufficient to support the jury's verdict that appellant intended to (or knew that he was reasonably certain to) cause two deaths when he repeatedly shot his SKS semi-automatic rifle at the birthday party group on Ms. Stevenson's front porch. Appellant's first and second points of error are overruled.

The Validity of the Arrest Warrant

In his third, fourth, fifth, and sixth points of error, appellant contends that the trial court erred in denying his motion to suppress his four written statements because these statements were "the fruit" of an arrest

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[22] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (judging sufficiency of evidence to support conviction by assessing "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); *see Dowden v. State*, 758 S.W.2d 264, 272-73 (Tex.Crim.App.1988) (evidence sufficient to support capital-murder conviction of police officer under doctrine of transferred intent when defendant initiated a "shoot-out" at police station).

warrant that was based upon false information within the affidavit. He claims that, if the false information were deleted from that affidavit, the remaining, accurate information was insufficient to establish probable cause to arrest him.

Appellant relies on *Franks v. Delaware*,[23] for the proposition that only information that the affiant believes is truthful and accurate may be considered in establishing probable cause for a warrant.[24] In *Franks*, the Supreme Court recognized that, if an affirmative misrepresentation is knowingly or recklessly included in a probable cause affidavit in support of a search warrant and that misrepresentation is necessary to establish probable cause, the warrant is rendered invalid

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[23] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[24] In *Franks*, the Supreme Court stated,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56.

under the Fourth Amendment.[25] But an officer's mere negligence or innocent mistakes are insufficient to invalidate the warrant.[26]

The trial judge at a suppression hearing, even one involving a *Franks* claim, is the sole trier of fact and the judge of the credibility of the witnesses and the weight to be given the evidence .[27] Appellant claims that there is a conflict or inconsistency between two statements purportedly made by April Coffield to Detective Johnson in the arrest-warrant affidavit and in a recorded interview that the detective conducted with Ms. Coffield the day after the murders. The pertinent portion of the affidavit, with the disputed portions underlined, states the following:

> April Coffield was near the party at 5758 Luther Ct., visiting a cousin. I interviewed Coffield. Coffield saw what she believed to be a green Ford Focus drop a black man off in the 5700 block of Luther Ct. Coffield saw the man run toward the four bedroom town home at

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[25] *Id.* Appellant also invokes article I, § 9 of the Texas Constitution, and notes that an analysis under state constitutional law must be separate and distinct from its federal counterpart. But he provides no separate and distinct analysis of the Texas Constitution as a basis for his federal constitutional claim under *Franks*. Therefore, we decline to address any potential distinction between appellant's claim under the federal and Texas constitutions.

[26] 438 U.S. at 171.

[27] *Hinojosa v. State*, 4 S.W.3d 240, 247 (Tex.Crim.App.1999); *Janecka v. State*, 937 S.W.2d 456, 462 (Tex.Crim.App.1996).

the corner of Anderson. Coffield saw a red dot on the ground while the man was running. . . .

> Coffield stated that she heard shots fired as did Charlene Ogierumwense. *Coffield ran into house and then peeked out.* Coffield saw the man, who got out of the car on Luther Ct., standing in front of the apartment where the children's birthday party was in progress. He was holding a rifle. Coffield then saw the man fire into the apartment. The man fled on foot. Ken Reid[28] saw the car that dropped off the man speed away from the scene. A man came out of the apartment at 5701 Anderson. The man was "hollering." Coffield recognized that there was trouble. Coffield went into the apartment in an attempt to help. In the apartment, Coffield saw people who appeared to have been shot. . . .

Detective F. Serra III 2167 prepared photospreads containing Davila and five other black males of similar physical characteristics. Detective Boetcher and I showed the photospreads to witnesses. Ken Reid immediately picked Davila as the man he saw carrying the rifle from Luther Ct. Reid told me that he saw Davila's face under a street light. April Coffield looked at the photospread. She seemed nervous at first. She put her finger on Davila and said she saw him once. Detective

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[28] At trial, the witness explained that his name is Kent Reed.

> Boetcher asked her about Davila. Coffield admitted to Detective Boetcher that she has seen Davila at least a dozen times. *Coffield then said that Davila was the man she saw running with a rifle and that Davila was the man she saw shoot into the apartment where Queshawn and Annette Stevenson were killed.*
>
> Appellant asserted that, during the April 7th recorded interview, Ms. Coffield did not make the specific statements that are underlined in the affidavit. During the pretrial hearing, Detective Johnson explained that Ms. Coffield had, at first, denied seeing appellant's face,[29] but then she gave a complete description of his weight, height, skin color, hair style, and she identified his photograph in the line-up.

The transcript of the recorded interview shows that she told Detective Johnson that she saw a person standing across the street from the Stevenson's house and shooting at the house. Then she identified appellant as the shooter in the subsequent photo line-up. Furthermore, at the time that Ms. Coffield made the photo identification, she gave the detective additional details about appellant that were not part of the initial recorded interview. And the affidavit reflects these

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[29] In fact, during the recorded interview, Coffield said, at one point, that she never saw the shooter's face on the night in question. But the single most distinctive aspect of appellant's appearance are the remarkably large shiny earrings he wore and the large silver-colored bolts through his ear. These earrings and bolts are prominently obvious in appellant's photograph that both Kent Reed and Ms. Coffield identified as being the shooter. Appellant may be identified more by his ears than his face.

added statements were made at the time that she made the photo identification, not at the time of the recorded interview.

Although Ms. Coffield said that she did not see the rifle as the shooter walked through the field, she did tell the detective that she had seen a "red beam" following him, and other witnesses had already described the semi-automatic rifle with the "red dot." Appellant also claims that Ms. Coffield never said that she "peeked" out of the house that she ran into after hearing the initial shots. Indeed, she never used the word "peek" during the initial interview, but she did say that, after the first burst of gunfire, she ran inside her cousin's house, and then, when she thought the shooting "was over and done with – I started going toward the [Stevenson's] house and then seen him standing at the house and he started shooting again."

In sum, Detective Johnson explained the perceived inconsistencies and discrepancies between the details Ms. Coffield gave him during their initial interview and those that she made at the second interview when she identified appellant's photograph. There is no evidence that Detective Johnson knowingly, intentionally, or with reckless disregard for the truth, made false or misleading assertions in his affidavit. The trial judge could reasonably believe that any inconsistencies were the result of negligence or innocent mistake by Detective Johnson. Furthermore, these discrepancies are minor and not material to the existence of probable cause set out in the affidavit. The trial judge did not abuse her discretion in denying appellant's

motion because he had not proven, by a preponderance of the evidence, that Detective Johnson inserted false or misleading information in his affidavit.[30]

Finally, several days after the evidentiary hearing, the trial judge stated an alternative basis for her original ruling denying appellant's motion to suppress. She found that, even if all of Ms. Coffield's statements were omitted from the affidavit, the magistrate still had probable cause to issue the arrest warrant. She explained, "I know the State didn't specifically argue if you excise it, it's still sufficient, but that was the analysis I went through." We agree. Even if all of the information supplied by April Coffield is excised from the affidavit, the remaining information suffices to establish probable cause to believe that appellant was the person who shot and killed Annette Stevenson and her granddaughter. This alternate finding also satisfies *Franks*.[31] We overrule appellant's third, fourth, fifth, and sixth points of error.

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[30] *See Franks*, 438 U.S. at 156; *United States v. Kattaria*, 553 F.3d 1171, 1177 (8th Cir.) (en banc) (per curiam) ("We review the denial of a *Franks* hearing for abuse of discretion."), *cert. denied*, 558 U.S. ___ (2009).

[31] *See Franks*, 438 U.S. at 155-56 (if purportedly false statements are set aside, the remainder of the affidavit must be insufficient to establish probable cause before the warrant may be held invalid); *Ramsey v. State*, 579 S.W.2d 920, 922-23 (Tex.Crim.App.1979) (before warrant may be held invalid, defendant must "[s]how that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant.").

The Voluntariness of Appellant's Written Statements

In his seventh, eighth, ninth, and tenth points of error, appellant claims that the trial judge erred in overruling his motion to suppress his four written statements stemming from custodial interrogation. He argues that his statements were involuntarily made because he did not eat, drink, or go to the bathroom for almost seven hours during his interview with Detective Johnson. He argues that he was deprived of these basic needs and therefore any statements he made were unconstitutionally coerced.[32] He states, "Though Detective Johnson testified that Appellant made no specific requests for anything, Appellant contends that it [is] ridiculous to believe that anybody would be in a position to give four voluntary written statements without receiving some food or water and without needing to use the restroom."

Detective Johnson testified that appellant was arrested and brought to the police station at about 1:40 p.m. on April 8th. Detectives Johnson and Boetcher met with him in an interview room where appellant's handcuffs were removed and he was placed in leg cuffs. He began the interview by asking appellant if he wanted "anything to eat or drink or anything like that. He said no. I do it that way every time. And then I advised him of his *Miranda* rights." Appellant told

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[32] Appellant relies upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and Article 38.22 of the Texas Code of Criminal Procedure.

Detective Johnson that he understood his rights and that "he freely, intelligently and voluntarily waive[d] those rights" and agreed to talk with the officers. "He was very relaxed. Just sat there kind of casual." Appellant gave his first statement beginning at 4:00 p.m. and ended it at 4:25. He gave the second statement beginning at 6:47 p.m. and completed it at 7:22. The officers began taking the third statement at 7:38 p.m. and concluded it at 8:12.[33] Detective Johnson said that he did not do anything to deny appellant his basic needs, did not prevent him from having liquids or food, and did not prevent him from going to the restroom. He took a picture of appellant lounging casually in his chair in the interview room. Appellant does not appear to be under any stress or duress.

On cross-examination, Detective Johnson again said that appellant appeared very relaxed; "[t]he whole thing was extremely friendly." Appellant "never asked to go to the bathroom"; he never asked for fluids or food. Detective Johnson reiterated that he had offered, but appellant turned him down.

Detective Boetcher also testified and said that appellant gave his fourth statement beginning at 8:45 p.m. and completed it at 9:06. He said that appellant had used the restroom, but he did not specify when.

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[33] This third statement is the one in which appellant admitted his guilt and explained his actions. Detective Johnson was not present when Detective Boetcher took the fourth statement concerning the extraneous murder.

The trial judge entered oral findings into the record and stated, inter alia,

> [Appellant] was offered nothing in exchange for these three statements. There was no force, threats, or coercion made by the police. He was lucid. Did not appear intoxicated. Never asked for a – food or for anything to drink.
>
> The court finds that the statements are freely and voluntarily made and are admissible.

Appellant argues, without citation to any authority, that it is simply "ridiculous" to think that a person could give four voluntary statements if he had not had food, water, or use of the restroom for seven hours, even though he had never asked for those amenities.

The warnings required by *Miranda* were established to safeguard an uncounseled person's constitutional privilege against self-incrimination during custodial interrogation.[34] The warnings required by article 38.22 are virtually identical to the *Miranda* warnings and are required to be given only when there is custodial interrogation.[35] The determination of whether a statement stemming from custodial interrogation is voluntary is based upon an examination of the totality of the circumstances surrounding its acquisition.[36] Additionally, great deference is accorded to the

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[34] *Herrera v. State*, 241 S.W.3d 520, 525 (Tex.Crim.App.2007).

[35] *Id.* at 526.

[36] *Id.* at 525; *Penry v. State*, 903 S.W.2d 715, 744 (Tex.Crim.App.1995).

trial judge's findings of facts concerning the voluntariness of a suspect's statement[37] and to her decision to admit or exclude such evidence, which will be overturned on appeal only where "a flagrant abuse of discretion is shown."[38]

Relevant factors to consider when determining whether a confession is coerced include, but are not limited to, whether the defendant received *Miranda* warnings; the defendant's age, intelligence level, education, and mental state; the conditions under which the defendant was interrogated (i.e., duration, environment and access to restroom facilities and food); and whether the defendant was physically punished.[39] A custodial interview lasting seven or more hours is not, by itself, unconstitutionally coercive.[40] Nor is the fact

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[37] *See Green v. State*, 934 S.W.2d 92, 98-99 (Tex.Crim.App.1996) (stating that, in the context of determining the voluntariness of a confession, the trial court is the sole fact finder and may elect to "believe or disbelieve any or all" of the evidence presented at a hearing on a motion to suppress); *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995) (at a hearing on a motion to suppress a confession, "the trial court is the sole judge of the weight and credibility of the evidence").

[38] *Delao v. State*, 235 S.W.3d 235, 238-39 (Tex.Crim.App.2007).

[39] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[40] *See, e.g., Clark v. Murphy*, 331 F.3d 1062, 1073 (9th Cir.2003) (confession not coerced when evidence showed that defendant was detained in a small interview room for about eight hours and did not ask for food or water or ask to use bathroom facilities); *Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir.1993) ("The fact that the questioning extended for six or seven hours is not per se unconstitutionally coercive."); *Sumpter v. Nix*, 863 F.2d 563, 565 (8th Cir.1988) ("The seven and one-half hour interrogation,

that the suspect was not given food, drink, or use of the bathroom, absent a request to do so. In the present case, Detective Johnson testified that he did offer appellant food and drink, but appellant declined the offer. Detective Boetcher testified that appellant did use the bathroom at some time during the interview. There is no evidence that appellant made any request for food, drink, or use of the bathroom that was denied. Detective Johnson further testified that the rapport between the officers and appellant was "extremely friendly" and that appellant was fully cooperative. The appellant proffers no persuasive argument or authority that his confession was not voluntarily given, and our review of the record reveals no evidence showing that his statement was not voluntary. We conclude that the trial judge did not abuse her discretion in admitting appellant's custodial statements.[41] We therefore overrule appellant's seventh through tenth points of error.

Sumpter's IQ of 89, and the special agent's references to Sumpter's child and wife, even if considered in combination with one another, do not make the confession involuntary."); *cf. Stein v. New York*, 346 U.S. 156, 185-86, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953) (twelve hours of intermittent questioning by different officers over a 32-hour period was not unconstitutionally coercive); *compare Greenwald v. Wisconsin*, 390 U.S. 519, 520-21, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (confession involuntary when the suspect, while on medication, was interrogated for over eighteen hours without food, medication, or sleep, and was denied requested counsel).

[41] *See Delao*, 235 S.W.3d at 238-39.

Appellant's Request for A Jury Instruction on Voluntariness

In his eleventh point of error, appellant contends that the trial judge erred in refusing to include an instruction in the jury charge concerning the voluntariness of his three written statements concerning the charged capital offense and the fourth statement concerning the extraneous murder that was introduced at the punishment stage. The sum total of his argument under this point of error is as follows:

> In the case at bar, a hearing was conducted on the voluntariness of Appellant's four statements. As argued in his previous points of error, Appellant was subjected to seven hours of custodial interrogation with no food, water, or access to bathroom facilities. The evidence raised a voluntariness issue and the trial court abused its discretion by not submitting an Art. 38.23 issue to the jury. *See Oursbourn v. State*, 259 S.W.3d 159, 177-78 (Tex.Crim.App.2008), *remanded for harm analysis and rev'd*, 288 S.W.3d 65 (Tex.App. – Houston [1st Dist.] 2009, no pet.).

During the jury charge conference, appellant asked the trial judge to include a written jury charge instruction under Article 38.23 concerning his custodial confessions. However, a defendant's right to the submission of an Article 38.23 jury instruction is limited to instances in which there are affirmatively disputed issues of fact that are material to the claim of a constitutional violation that would make the disputed

evidence inadmissible.[42] To raise a disputed fact issue for purposes of an Article 38.23 instruction, there must be some *affirmative* evidence that puts the existence of that fact into question.[43] For example, if there had been some affirmative evidence in this case that appellant had requested food, drink, or the use of the bathroom but his request was denied, that would suffice to raise a disputed fact (although that disputed fact might not suffice, by itself, to render appellant's confession constitutionally involuntary).[44] In the present case, however, appellant points to no such affirmative evidence

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[42] *Madden v. State*, 242 S.W.3d 504, 509-10 (Tex.Crim.App.2007); *Vasquez v. State*, 225 S.W.3d 541, 545 (Tex.Crim.App.2007) ("If there is no factual issue of how evidence was obtained, there is only an issue of law, which is not for a jury to decide under article 38.23(a).").

[43] *See Oursbourn v. State*, 259 S.W.3d 159, 177 (Tex.Crim.App.2008). In *Oursbourn*, which appellant relies on, we stated:

> A defendant must establish three foundation requirements to trigger an Article 38.23 instruction: (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary. The defendant must offer evidence that, if credited, would create a reasonable doubt as to a specific factual matter essential to the voluntariness of the statement. This factual dispute can be raised only by affirmative evidence, not by mere cross-examination questions or argument.

Id. (footnotes omitted).

[44] *See Madden*, 242 S.W.3d at 510 ("[I]f other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact is not submitted to the jury because it is not material to the ultimate admissibility of

in the record. He did not point to any such evidence at trial either. When the trial judge pointed out that Detective Johnson "admitted that there were – that [appellant] hadn't had anything to eat or drink, but there was no testimony that it went from that to being coercive in any way," appellant's counsel simply stated:

> I think what I'm arguing – what I'm asking you to consider is, inferentially, just on the face of that testimony, in – common day experience that somebody being interrogated for seven hours and they don't request food, drink or water – food, drink or bathroom facilities in front of you for 30 minutes are nervous, tense, and otherwise, and ask for water. It's obvious to me.
>
> In other words, appellant's position, both at trial and on appeal appears to be that a person who does not have food, drink or use of the bathroom for seven hours cannot, as a matter of law, give a voluntary written statement. First, as discussed in his points of error six through ten, this is not the law. Second, if this

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the evidence."); *see also Perry v. State*, 158 S.W.3d 438, 446 (Tex.Crim.App.2004) (defendant not entitled to any jury instruction under art. 38.23(a); evidence of his intoxication and injury "does not raise any constitutional voluntariness issues because this evidence does not involve any police coercion or other official over-reaching."); *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995) (statement involuntary under federal due process "only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker").

were the law, then appellant would not be entitled to a jury instruction under Article 38.23, because he is relying upon an issue of law, not an issue of disputed fact. And jury instructions are appropriate only when there is a disputed issue of material fact.[45] Therefore, appellant was not entitled to any jury instruction, and his eleventh point of error is without merit.

Miscellaneous Issues

In points of error twelve through fourteen, appellant raises various legal issues concerning the Texas death-penalty scheme and its implementation. We have repeatedly rejected these claims and appellant does not persuade us to overrule our prior cases.

In point of error twelve, appellant argues that the trial court erred in overruling his motion to declare Article 37.071 unconstitutional because Texas law permits a grand jury to indict a person for capital murder without first reviewing the evidence to support the punishment special issues. He relies on *United States v. Robinson*,[46] in which the Fifth Circuit held that a federal indictment charging a defendant with capital murder must allege the aggravating factors that render a defendant eligible for the death penalty in the

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[45] *Madden*, 242 S.W.3d at 510; *see also Oursbourn*, 259 S.W.3d at 177.

[46] 367 F.3d 278 (5th Cir.2004).

indictment.[47] That case, how ever, dealt only with federal indictments in federal prosecutions. The federal constitutional right to indictment in a felony case does not apply to the states.[48] Furthermore, the indictment in this case did allege the aggravating factors that elevated this case from a murder charge under Section 19.02 of the Texas Penal Code to capital murder – a murder that is eligible for imposition of the death penalty – under Section 19.03(a)(7)(A). Any capital-murder charge under Section 19.03 makes a defendant eligible for the death penalty under Article 37.071 if the State seeks the death penalty in the particular case. The elements of capital murder alleged under Section 19.03 suffice to put the defendant on notice that the State may seek the death penalty. No further pleading within the indictment is necessary.[49]

In his thirteenth point of error, appellant argues that the trial court erred in overruling appellant's objection to the so-called "10-12" rule in the Texas death penalty scheme. We have repeatedly considered and rejected this claim.[50]

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[47] *Id.* at 284.

[48] *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (the right to a grand-jury indictment has not been extended to the States through the Fourteenth Amendment).

[49] *See Renteria v. State*, 206 S.W.3d 689, 709 (Tex.Crim.App.2006); *see also Crutsinger v. State*, 206 S.W.3d 607, 613 (Tex.Crim.App.2006); *Perry v. State*, 158 S.W.3d 438, 446-48 (Tex.Crim.App.2004); *Hankins v. State*, 132 S.W.3d 380, 387 (Tex.Crim.App.2004); *Resendiz v. State*, 112 S.W.3d 541, 550 (Tex.Crim.App.2003).

[50] *See Coble v. State*, ___ S.W.3d ___, No. AP-76,019, 2010 WL 3984713 at *23 (Tex.Crim.App. Oct.13, 2010); *Williams v. State*,

In his fourteenth point of error, appellant asserts that the trial judge erred in overruling his motion to instruct the jury that the State bears the burden of proof concerning the lack of mitigating evidence. We have repeatedly rejected this argument.[51]

Having reviewed all of appellant's fourteen claims, we find that none of them require reversal of the jury's verdict, and we therefore affirm the trial court's judgment and sentence.

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301 S.W.3d 675, 694 (Tex.Crim.App.2009); *Smith v. State*, 297 S.W.3d 260, 278 (Tex.Crim.App.2009); *Segundo v. State*, 270 S.W.3d 79, 102-03 (Tex.Crim.App.2008); *Russeau v. State*, 171 S.W.3d 871, 886 (Tex.Crim.App.2005).

[51] *See, e.g., Mays v. State*, 318 S.W.3d 368, 397 (Tex.Crim.App.2010) ("This Court has consistently held that, under Texas statute, the State does not bear any burden of proof in the mitigation issue and that the statute setting out that issue and instructions is constitutional."), *citing Whitaker v. State*, 286 S.W.3d 355, 370 (Tex.Crim.App.2009); *Busby v. State*, 253 S.W.3d 661, 667 (Tex.Crim.App.2008).

Texas Court of Criminal Appeals
Case No. Writ No. _____

[C-1-009420-1108359-A]

Trial Court Writ No. _____

(Trial Court Cause No. 1108359D)

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN

EX PARTE	§	**11.071 HABEAS**
	§	**WRIT**
ERICK DANIEL DAVILA	§	

ORIGINAL 11.071 APPLICATION FOR HABEAS RELIEF FROM A JUDGMENT AND SENTENCE OF DEATH IN CRIMINAL DISTRICT COURT NUMBER ONE FOR TARRANT COUNTY, TEXAS, THE HONORABLE SHAREN WILSON, JUDGE PRESIDING.

An in-court hearing *is* requested.

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* * *

GROUNDS PRESENTED

GROUND ONE: MR. DAVILA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL BECAUSE OF THE DEFENSE TEAM'S FAILURE TO CONDUCT A MINIMALLY SUFFICIENT MITIGATION INVESTIGATION.

GROUND TWO: TEXAS' CURRENT DEATH PENALTY SCHEME VIOLATES THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE JURIES ARE GIVEN INSUFFICIENT GUILDANCE [sic] **ON WHAT THE SO-CALLED "FUTURE DANGER" SPECIAL ISSUE REQUIRES THEM TO PREDICT.**

GROUND THREE: BECAUSE THE "FUTURE DANGER" SPECIAL ISSUE SUBMITTED TO TEXAS DEATH PENALTY JURIES IS SO INHERENTLY COMPLEX AND CONVOLUTED, TEXAS' CURRENT DEATH PENALTY SCHEME VIOLATES THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

* * *

Discussion

The Supreme Court established the legal principles governing claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance

claim has two components: First, a petitioner must show that counsel's performance was deficient, and second; that the deficiency prejudiced the defense. *Id.* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. The Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* That "objective standard of reasonableness" also applies to punishment stage mitigation investigations in death penalty cases. *Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003).*

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland* at 690-91, 104 S.Ct. 2052.

The Supreme Court's opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, the Court applied *Strickland* and concluded that counsel's failure to uncover and present significant and otherwise mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed]their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. 362, at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland.*

In assessing counsels' investigation, the reviewing court must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland*, 466 U.S., at 588, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.*, at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight"). Despite these norms, however, Mr. Davila's trial mitigation team abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (noting that among

the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religions and cultural influences (emphases added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . Investigation is essential to fulfillment of these functions").

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Mr. Davila asks this Court to note the myriad of things not learned by defense counsel until after the trial and his sentence of death – things that could have been discovered through reasonable investigation. He incorporates, by reference, the post-conviction mitigation report and attached affidavits in the appendix documents at the end of this Application.

The reviewing court must determine, *de novo*, whether counsel reached beyond the rudimentary records in their investigation of petitioner's background. The record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one the Supreme Court described in *Wiggins v. Smith* 539 U.S. 510, 123 S.Ct. 2527 (2003).

Evidence about the defendant's background and character is relevant because of the belief, long held by reviewing courts, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse. *See Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71, L.Ed.2d 1 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death").

In the instant case counsels' exploration of the punishment mitigation question was almost entirely dependent on the investigation conducted by Dr. Emily Fallis, a Fort Worth area psychologist. The role Ms. Fallis played in the defense mitigation "team" required her to identify and then interview potential mitigation witnesses. The crux of Applicant's complaint is that Ms. Fallis' investigation was incomplete and, and fell short of the minimum requirements of the. The mitigation evidence discovered by Mitigation Partners in their post-conviction investigation – evidence of a highly abusive childhood with an extremely dysfunctional family – is overwhelming and, if known by defense counsel at trial, would likely have been presented to and considered by the jury in connection with the mitigation special issue. Because defense counsel's case at punishment was almost entirely reliant on the mitigation investigation conducted by Dr. Fallis, her shortcomings should be deemed so insufficient as to require remand for a new sentencing hearing.

In reversing a defendant's sentence of death in *Ex Parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006),

this Court was unequivocal in holding that defense counsel has a duty to make a reasonable investigation in order to make a reasonable decision as to whether and how to make use of the evidence. *Id.* at 396 (ruling that counsel failed in his duty to conduct an adequate mitigation investigation). In other words, counsel's strategic decisions must be made after a reasonable investigation of the potential evidence. The minimally reasonable mitigation investigation required by *Wiggins* was not done in this case, requiring the remedy of reversal remand for another sentencing determination.

* * *

No. 4:13-cv-506

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

ERICK DAVILA,

Petitioner,

v.

RICK THALER,

Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent.

Petition for Writ of Habeas Corpus from a
Capital Murder Conviction in the Criminal
District Court No. 1 of Tarrant County

PETITION FOR WRIT OF HABEAS CORPUS

(Filed May 19, 2014)

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Court-Appointed Attorneys for Petitioner Erick Davila

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE U.S. DISTRICT COURT:

NOW COMES, **ERICK DAVILA**, the Petitioner, and respectfully submits his Petition for Writ of Habeas Corpus, asking the Court to issue a writ ordering his release from the Institutional Division of the Texas Department of Criminal Justice. This application follows his conviction and death sentence in the Criminal District Court No. 1 of Tarrant County, cause number 1108359d, styled *State v. Erick Davila.*

Davila is illegally restrained of his liberty by the Director of the Texas Department of Criminal Justice – Institutional Division, by virtue of a sentence and judgment imposing the penalty of death rendered in cause number 1108359d styled *State v. Erick Davila.* (See, Exhibit "A").

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Petitioner, ERICK DAVILA, certifies that the following listed persons have an interest in the outcome of this case.

These representations are made in order that this court may evaluate possible disqualifications or recusal.

Interested Parties		
Individual	***Address***	***Participation***
	Petitioner	
Mr. Erick Davila	Polunsky Unit	Petitioner
Mr. Seth Kretzer	The Lyric Center 440 Louisiana Street Suite 200 Houston, TX 77002 (713) 775-3050 (direct) (713) 224-2815 (fax)	Appointed attorney for current federal habeas
Mr. Jonathan Landers	Jonathan Landers 2817 W. T.C. Jester Houston, Texas 77018 (713) 301-3153 – (phone) (713) 685-5020 – (fax)	Appointed attorney for current federal habeas
Mr. Robert Ford	**DECEASED**	Trial Counsel

Ms. Joetta Keene	204 S Mesquite St. Arlington, TX 76010	Trial Counsel
Mr. David Richards	David Richards 204 West Central Avenue Ft. Worth, TX 76164 (817) 332-5567 (Phone)	state writ lawyer
Ms. Mary Thornton	3901 Race Street Fort Worth, Texas 76111	State direct appellate lawyer
Interested Parties		
Individual	***Address***	***Participation***
Respondent		
The Hon. Mr. Greg Abbott		Texas Attorney General
Mrs. Katherine Hayes	Office of the Attorney General Capital Litigation Division P.O. Box 12548, Capitol Station Austin, TX 78711-2548 (512) 936-1600 (voice) (512) 320-8132 (fax)	Asst. Attorney General

Judges		
Honorable Sharen Wilson	Tim Curry Justice Center 5th Floor 401 W. Belknap Fort Worth, TX 76196-7213 (817) 884-1551 (Office) (817) 884-1191 (Fax)	Trial and Habeas Judge

DESIGNATION OF ABBREVIATIONS and EXPLANATION OF THE TRIAL RECORD

"RR" refers to the reporter's record from the state trial court. "CR" refers to the clerk's record from state trial court. # Writ RR refers to the specific volume of the state writ hearing reports record. Writ CR refers to the state writ clerk's record.

STATEMENT OF JURISDICTION

This petition is submitted pursuant to 28 U.S.C. § 2254 et. seq., and amendments four, five, six, eight, and fourteen, of the United States Constitution, and section nine, clause two of the United States Constitution (habeas corpus).

DAVILA'S AEDPA DEADLINE WAS SATISFIED

Davila was convicted of capital murder in February of 2009. He filed a direct appeal in the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on January 26, 2011. *Davila v. State*, AP-76, 105, 2011 WL 303265 (Tex. Crim. App. Jan. 26, 2011), *cert. denied*, 132 S. Ct. 258, 181 L. Ed. 2d 150 (U.S. 2011). He filed a petition for writ of certiorari to the Supreme Court, which it denied on October 3, 2011. *Davila v. Texas*, 132 S. Ct. 258, 181 L. Ed. 2d 150 (2011). Thus, his conviction became final for the purposes of his federal writ on October 3, 2011. *See, e.g.*, *Giesberg v. Cockrell*, 288 F.3d 268, 270 (5th Cir. 2002); *Crutcher v. Cockrell*, 301 F.3d 656 (5th Cir. 2002).

"The time during which a properly filed application for State post-conviction . . . claim is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2). Davila filed his state writ on August 29, 2011, before the Supreme Court denied his petition for certiorari. The Court of Criminal Appeals denied his writ on April 17, 2013. *Ex Parte Davila*, WR-75, 356-01, 2013 WL 1655549 (Tex. Crim. App. Apr. 17, 2013). Davila's federal habeas clock began to tick on this date; and his initial writ had to be filed by Thursday, April 17, 2014. Davila filed his initial writ on April 14, 2014. *See* Doc. no. 16, Petition for Writ of Habeas Corpus.

However, this Court has entered an order allowing Davila to amend his writ with a version to be filed in May. This is the amended version.

EXHAUSTION

Davila asserts that most of the federal constitutional claims alleged herein have been exhausted in proceedings before the Texas courts.[1] The exceptions are *Trevino* claims alleging that the state writ lawyer, David Richards, rendered ineffective assistance at the state writ level, and a related claim that appellate counsel Mary Thornton was ineffective by failing to raise the strongest appellate point of error in Davila's case. As explained below, these claims are not defaulted because Ineffective Assistance of Counsel at the state appeal and collateral review levels constitute cause and prejudice to excuse any default.

PROCEDURAL HISTORY

A. Procedural History in State Court

In the superseding indictment filed June 18, 2008, Erick Davila was charged with the offense of capital murder (two murders during the same criminal transaction). Tex. Penal Code § 19.03(7)(A). 1 CR 1-3. On February 10, 2009, Davila pleaded not guilty before a jury. 14 RR 9-10. Nine days later, on February 19, 2009, after hearing evidence from the State and the defense, the jury found Davila guilty of capital murder. 9 CR

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[1] The burden is on Respondents to demonstrate that Davila failed to exhaust a particular claim. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Esslinger v. Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995); *Herbst v. Scott*, 42 F.3d 902, 905 (5th Cir. 1995); *English v. United States*, 42 F.3d 473, 477 (9th Cir. 1994); *Brown v. Maass*, 11 F.3d 914, 914-15 (9th Cir. 1993); *Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992).

1947-49; 20 RR 55. After hearing additional testimony from witnesses called by both sides, the jury answered Special Issue Number One (whether there is a reasonable probability that Davila would commit criminal acts of violence that would constitute a continuing threat to society) "yes" and Special Issue Number Two (whether there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment) "no." 9 CR 1947-49; 26 RR 5-7. Accordingly, the trial court sentenced Davila to death by lethal injection on February 27, 2009. 9 CR 1947-49; 26 RR 7-8. *See* Tex. Code Crim. Proc. Art. 37.071 § 2(g). On March 2, 2009, Davila's conviction and sentence of death were automatically appealed to the Texas Court of Criminal Appeals. 9 CR 1952.

B. Procedural History in Federal Court

On June 21, 2013, the state habeas lawyer filed a motion for appointment of federal writ counsel. Doc. No. 1. In July of 2013, this Court appointed Seth Kretzer and Jonathan Landers. Doc. No. 4. On March 19, 2014, this Court granted Davila permission to amend his writ within one month of filing a writ meeting the AEDPA deadline. Doc. No. 9. Each claim filed in this amended writ was included in the initial writ which was timely filed. *See* Doc. no. 16, Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

On April 7, 2008, Erick Davila shot at a gang rival named Jerry Stevenson. Unfortunately, a grandmother and a little girl died who happened to be near Stevenson but whom Davila did not know and had no animus towards.

I. Guilt and innocence, a question of intent, and an improper jury charge.

In Texas, a person can be found guilty of capital murder for intentionally killing more than one person during the same criminal transaction. Tex. Penal Code § 19.03. Importantly, one must have the specific intent to murder at least two people to be guilty of this offense; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

Davila's defense counsel argued from the start that the most important issue for the jury would be intent. 14 RR 16. Specifically, in their opening statement, defense counsel asked the jury to pay close attention to whether or not "Erick had the specific intent to kill these two folks, intentionally or knowingly." *Id.* at 17. The defense theme continued through closing, when defense counsel once again argued that Erick was attempting to shoot only Jerry Stevenson, with whom he'd had previous confrontations, rather than anyone else. *See, e.g.*, 20 RR 22.

A. The shooting

On April 6, 2008, 47-year-old Annette Stevenson hosted a birthday party for her granddaughter Nautica, at her residence in Village Creek Apartments, located at 5701 Anderson Street in Fort Worth, Texas. 14 RR 19-21; 15 RR 42-44. Nautica's sister, Cashmonae, their two brothers, and several of their young cousins and friends attended the party. 14 RR 20-22; 15 RR 40, 43-44. Annette's son, Jerry Stevenson, his five-year-old daughter, Queshawn, and his three-year-old son were in attendance. 14 RR 21, 24; 15 RR 44, 48, 54-55. Also present were Jerry's sister Tamesha, the mother of Nautica and Cashmonae, and his sister Talisha; these siblings and their children all resided with Annette. 14 RR 19-20; 15 RR 41, 44. Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42-43.

The scene of shooting was in a part of Fort Worth known at the time as "Blood" territory. *See, e.g.*, 14 RR 189. It was also undisputed that that Erick Davila was a member of the Truman Street Bloods gang. 16 RR 54-64. Jerry Stevenson testified that he was not a gang member, but that he hung around many gang members. 15 RR 92-95. Specifically, he had friends who were Polywood Crips, but he denied being a Crip himself. *Id.* at 72. Stevenson also recognized that the house where he lived (the same house where the shooting took place), was probably identified as a Crip house. *Id.* at 92-95. He further acknowledged that it could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

Indeed, there had been trouble just a few weeks before the shooting. Jerry, little Garry (Jerry's nephew), and Jeremy (Jerry's brother) were at Jerry's mother's house. *Id.* at 73. All of the men were in their 20s. *Id.* at 74. Two other men were also present at the house; they had been in an altercation with little Garry. *Id.* at 75. At one point, one of the two other men had threatened to shoot him. *Id.* at 75. Jerry intervened in the argument and separated the parties. *Id.* at 75-76. Jerry recognized one of the two men arguing with his cousin as "Mike-Mike," but he did not recognize the other person (and did not believe Davila was present at the argument). *Id.* at 76-77. However, a security guard working at the townhomes where the altercation took place, Mrs. Stephen-Mosley (affectionately known as Pookie), did recognize Davila as one of the men arguing with Stevenson. 19 RR 77-78. Stevenson also admitted that the men he was arguing with were associated with the Bloods gang. 15 RR 76-77.

Unlike Jerry Stevenson, Detective Johnson of the Fort Worth Police Department did have information that Crips lived at 5701 Anderson; he also thought the shooter was possibly a Blood. 17 RR 280.

Ms. Stephens-Mosley testified in detail about the argument that took place at 5701 Anderson in the weeks before the shooting. Ms. Stephens-Mosley, the security officer who worked for the apartment complex, recalled the incident as taking place on March 13th. 19 RR 62. She remembered being called to 5701 Anderson and finding six gentlemen in a conversation, and two of those gentlemen were Garry and Dunna (a.k.a.

Dooney, or Jerry Stevenson). *Id.* at 63. Ms. Stephens-Mosley recalled two men being on one side of the conversation and four being on the other; she recalled a really intense conversation. *Id.* at 64-65. She asked the parties to leave the complex. *Id.* at 65-67. Ms. Stephens-Mosley was concerned somebody would get a gun. *Id.* at 69. Importantly, Ms. Stephens-Mosley specifically remembered that Erick Davila was one of the people arguing with Jerry Stevenson, and according to her, Stevenson told her that Erick or his companion had pulled a gun during the argument. *Id.* at 69-70.

On the evening of April 6, there was another birthday party going on at the apartment complex. 14 RR 55, 122-23, 241. Yvonne Watts, who lived one street over on Luther Court, also in the Village Creek Apartments, held the party for her daughter. 14 RR 241. Kent Reed, his wife Arlette Keys, her 15-year-old brother Eghosa Ogierumwense, and Arlette's mother, Charlene Ogierumwense, along with several other teenagers and children, celebrated inside and outside the Watts' residence. 14 RR 55, 59-60, 122-23, 126, 240-42.

At approximately 7:30 p.m., Kent, Arlette, and Eghosa saw a black Mazda 626 automobile with dark tinted windows, custom vents, and racing wheels drive up and abruptly park on Luther Court. 14 RR 61, 68-69, 123-25, 242-43; 16 RR 53-56. All three watched as Davila exited from the vehicle with a rifle equipped with a red laser sight. 14 RR 61-65, 127-28, 242-44; 16 RR 71-72, 110-11, 123-31; 18 RR 140-42. Immediately after Davila exited the car, another individual moved

into the driver's seat and sped away (this person was Garfield Willis Thompson, whose capital murder charge was ultimately dismissed when he plead to a different aggravated robbery). 14 RR 61, 140. As he toted the weapon at his side, Davila walked past Kent and Eghosa toward the home of a woman known as "Miss Sheila." 14 RR 63, 76, 130-31, 246. When no one responded to his knock, Davila proceeded in the direction of the Stevenson party. 14 RR 66, 131-40, 246.

Eghosa followed Davila. *Id.* at 132-34. Eghosa testified that he watched Davila stop at the corner of house across the street from 5701 Anderson. *Id.* at 134-136. There were kids outside of the house, Granny (Annette Stevenson) was on the porch, and Dooney (Jerry Stevenson) was outside. *Id.* at 136-37. Eghosa initially saw the red beam from the rifle shinning on Dooney, at which point Dooney turned around and went into the house. *Id.* at 138. Then Davila started shooting the gun. *Id.* There were women and children outside when Davila started shooting, but Eghosa never saw the beam on any of them. *Id.* Davila then ran to the middle of the street, shot again, and jumped in a car and drove off. *Id.* at 140-141. On cross examination, Eghosa explained that after Dooney walked into the house, the shooter started shooting at the house. *Id.* at 157. Shots were going everywhere. *Id.*

Eghosa, along with many other people, ran inside the Stevenson residence. 14 RR 26, 142. Arlette, a registered nurse, also went inside to offer her assistance. *Id.* at 80-82, 248-49. Annette and Queshawn Stevenson had both been fatally shot. 14 RR 142-43; 18 RR

265-78. Cashmonae, Nautica, Brianna Scott, and Sheila Moblin all suffered non life-threatening injuries. 14 RR 26-28; 15 RR 257, 259.

B. Davila's Clinically Bad Eyesight

Davila was not wearing glasses at the time of the shooting. 14 RR 120. His girlfriend explained that he did not have glasses at the time of shooting, but that he needed them to see. 16 RR 97. Davila presented testimony from an optometrist who evaluated him after the shooting, and he confirmed Davila's poor eyesight. 19 RR 91-92, 97-99. Specifically, the prescription for Davila's right eye was 20/140, and 20/80 for the left eye. *Id.* Pictures were taken from 40 feet to show the jury the effects of such poor eyesight. *Id.* at 93-94, 100-101; Defense Ex. 101, 100. The shooting had taken place at distances of 84 feet and nearly 100 feet from the house. 15 RR 152, 19 RR 124.

C. Jury seized on "intent" argument, but was given an improper jury charge which impeded their ability to give Davila relief

After the close of evidence in the guilt and innocence phase, the court held the customary charge conference with the parties. 19 RR 137-159. All agreed that Davila was entitled to an instruction for the lesser included charge of murder. *Id.* at 141-43. The court instructed the jury on the lesser included offenses of murder for both Queshawn Stevenson and Annette Stevenson. *CR* at 1923-29. The defense also requested

a manslaughter charge, which was given over an objection from the state. 19 RR 147-48; CR at 1923-1929.

Quite strikingly, the state never requested a transferred intent instruction as allowed by Texas Penal Code § 6.04. 19 RR 137-159. As there was no transferred intent instruction, the jury was given the following instruction related to capital murder:

> Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

CR at 1924. The charge was given to the jury at the beginning of the day on February 19, 2009.

In the middle of the afternoon, after the jury had been deliberating for four hours, the jury sent the following note to the judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others." *Id.* at 1931. The judge responded with an incorrect instruction, which did not clarify that Davila

must have intended to kill two distinct people before he could be convicted of a capital murder:

The Court gives the additional charge on the law as follows:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected.

CR at 1933. The defense objected to this charge, but the objection was overruled. 20 RR 53.

After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934.

Shockingly, Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal.[1]

D. Evidence adduced at the punishment phase

During the penalty phase, the state presented evidence of Davila's prior crimes and an attempted jail

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[1] That appellate counsel raised the sufficiency argument shows she knew of the specific intent required for capital murder as charged in Davila's case. With that in mind, it is amazing she did not raise the jury charge error claim, especially where the jury charge was objected to by trial counsel.

escape while Davila was awaiting trial. The state admitted evidence of an armed robbery that, according to the victims, Davila had participated in. 20 RR 58-108. The state also introduced evidence of another shooting which had taken place shortly before the shooting at the birthday party. 21 RR 19-20, 68-92. Essentially, the testimony was that Davila shot a crack dealer named Tricky, or Lamont, prior to the shooting on Anderson. *Id.* at 68-92. Davila gave a confession for this shooting, his fourth confession in eight hours, claiming he had been threatened at gunpoint by the deceased earlier in the day. *See* State's Ex. 237. A pair of Arlington Police Officers also testified about a time when they stopped Davila for a traffic offense, and found him to have a fully loaded 9 mm handgun in the car. 22 RR 31-59. He had been rude to the arresting officers during the arrest. *Id.* One jailer explained that Davila had been disruptive and refused to get off a phone call while locked up in the Tarrant County Jail. *Id.* at 100-109. Finally, the state presented extensive evidence showing that Davila had been involved in an attempted escape from the Tarrant County Jail while awaiting trial. *See, e.g.*, *Id.* at 154-198. Two guards were beaten badly during the escape attempt. *Id.*

The defense called Davila's father, Mario Davila, to testify. 23 RR 219. He was serving the nineteenth year of 20-year sentence for murder. *Id.* at 220. Mario explained that he was 28 years old when he met Erick's mother, Sheila, and she was only 13 when she became pregnant with Erick. *Id.* at 230. Erick was born when she was 14 years old. *Id.* at 230-31. He explained that

he had been in prison for almost all of his children's lives. *Id.* at 230-240. He drank a lot, and the duty to raise the kids fell on Sheila, Erick's teenage mom. *Id.* On cross-examination, Mario explained that he and Sheila were good parents. *Id.* at 249-51.

Erick's sister, Emily, was called to testify the following day. 24 RR 11. Emily explained that her mother had kicked her out of the house at 16, and she had been taken in by her future mother in law. *Id.* Emily further explained that she and Erick had found out that their stepdad, Santos, was not their biological father when they were 13. *Id.* at 20-30. She explained Erick had been kicked out of the house when he was 15 years old, and that he was dating a lady in her mid 30s at that time. *Id.* She explained that she and her mom had been in physical fights before, and that she disagreed with her mom's treatment of her younger sisters. *Id.* Finally, she explained that the area they were from was full of gangs and violence. *Id.* at 31-42.

Erick's mother, Sheila Olivas, also testified. *Id.* at 48. She explained that she had seven children and that Erick was the oldest and only boy. *Id.* at 50. She claimed to have been sold to Mario, and additionally claimed that Mario had raped her. *Id.* She was a virgin when she was sold to Mario. *Id.* 53-54. She explained that she was poor when she was teenage mother, and that her sister would help to support her. *Id.* 60-70. She explained that Erick had never seen his dad before and that he had grown up around domestic violence. *Id.*

According to Sheila, Eric had been diagnosed with ADHD and had bad eyesight, but she did not like him to take any Ritalin because it made him like a zombie. *Id.* at 69-70. She claimed that she never knew her son was involved in gangs. *Id.* 71-72. She said that she thought she was an overprotective mother. *Id.* 78-79. She admitted, however, that she never went to see her son in jail until six months after his arrest. *Id.* at 89-90. She claimed that she was attempting to find out who his attorneys were and had no idea they had been looking for her. *Id.* at 90-91. She explained that she was simply too busy to meet with the attorneys because she was starting her own church, but she had agreed to meet the trial attorneys for 30 minutes at Starbucks. *Id.* at 89-94. The reason she did not return calls was that her phone was messed up, but she did confirm she got the text from trial attorney Keene explaining she would be arrested if she did not show up for court and testify. *Id.* at 91-94.

On cross-examination, Sheila claimed that she did everything she could for her kids. *Id.* at 97. She believed Erick had done well in school (as opposed to failing most of his classes). *Id.* at 96. She said that she was overprotective and kept her children in her line of vision to make sure they were safe. *Id.* at 97. She knew that all of the problems her son had in school came from the fact "you had to touch him for him to focus." *Id.* at 99. She thought that Erick had the potential to be a super bright student, but his problem was that he was seeking attention. *Id.* at 100. Sheila explained the reason she kicked her daughter out of the house at age

16 was to make sure she was protected. *Id.* at 104. She kicked Erick out for the same reason. *Id.*

Sheila's sister, Deborah Jones, testified that Sheila got pregnant while she was young, and that Erick had come to live with her when he was 14 because Sheila thought it could help him get away from gangs. *Id.* at 111-124. Angela Jones, another sister of Sheila's, also testified for the defense, but she did not add much additional evidence. *Id.* at 134-154.

The main defense mitigation witness was Dr. Emily Fallis. *Id.* at 184-261; 25 RR 41. She was hired to do the social history of Erick. 24 RR 184. She explained that although Sheila was only 13 years old when Erick was conceived, and 14 when he was born, the birth was normal. *Id.* at 190-91. He had met the development milestones one would expect for a healthy child. *Id.* However, he had behavior problems in the first grade and the school he was attending threatened to expel him. *Id.* at 191-92. Dr. Fallis explained that Sheila had lied to her about Erick playing sports as a kid, and not having problems in school. *Id.* at 193-200. Erick struggled in school, made poor grades, and had borderline IQ scores. *Id.* at 200-210. She explained that during his prior prison stay, Erick did not have any serious discipline problems. *Id.* at 219.

It was Dr. Fallis' belief that Sheila neglected her children's education by not making Erick wear glasses or take his ADHD medicine. *Id.* at 231-32. Essentially, Fallis testified that Erick was put in a disadvantageous position from the start.

The main theme of the mitigation case was that Davila's teenage mom neglected him by failing to make him take his medicine and not making him wear glasses.

E. The state writ proceedings were contaminated with IAC *ab initio*

Erick's state writ started with a whimper, as the state writ attorney, David Richards, allowed the deadline for filing the writ to pass without filing a writ or an extension. Writ CR at 358-60. Luckily, the Court of Criminal Appeals allowed Richards an additional 180 days from March 2, 2011, to file the writ. *Id.* at 361-62. Richards filed the 18-page state writ on August 29, 2011, and attached to it a mitigation report compiled by Mitigation Investigator Toni Knox. Mrs. Knox had identified many potential witnesses who would have testified at Davila's trial had they been asked to, but because none of the witnesses were called to testify at the state writ hearing, it appears the judge discounted their potential testimony. Writ CR at 334, 339.

The state trial court held a hearing on the *Wiggins* ineffective assistance of counsel claim raised by Richards. The writ hearing was held on July 2, 2012. *See* 2 Writ RR 1. According to a recently obtained affidavit from the mitigation investigator Toni Knox, Richards did not contact her concerning the hearing until late June 2012. *See* Exhibit "B", Affidavit of Knox. When they spoke on the phone on June 24, Richards did not have a copy of her report (which had been attached to

the writ he filed.) *Id.* Knox did not feel Richards was prepared for the hearing. *Id.* at 2.

The first time that Knox met with Richards in preparation for the hearing was on the date of the hearing. *Id.* They met for one hour, much of which was spent with Knox speaking with the prosecutors and Richards ordering lunch. *Id.* Knox believed that Richards was not familiar with her report, and that he made no effort to call any of the potential mitigation witnesses she had discovered as part of her investigation. *Id.* Finally, Knox believed that Richards had been having health issues around the time he was working on Davila's writ, and that his physical impairment diminished his ability to represent Davila. *Id.*

Davila asserts that Richards was ineffective in both the way he presented the *Wiggins* claim, and by not raising other clearly meritorious claims.

F. Mitigation Specialist Toni Knox uncovers powerful undiscovered mitigation evidence

Thankfully, the state writ attorney did request funds for a mitigation investigator. Writ CR at 355. The motion for funds was granted on July 6, 2009. Additional funding for the mitigation investigator was granted on July 20, 2011. *Id.* at 366. The mitigation specialist, Toni Knox, uncovered valuable mitigation evidence that was not presented to the jury at punishment, including:

- Rosa Nash Jones, Erick's step-grandmother, and Sheila's step-mother, explained that Sheila had always been a trouble maker, even going so far as to fist fight her step-mother at the age of 12. Writ CR at 147. Instead of being sold as a virgin to Mario Davila, Sheila was already sexually active and had been sneaking out of her house and engaging in sexual relations prior to her relationship with Mario (meaning that Sheila lied to her teenage son, Erick, concerning his being conceived by rape). *Id.* Sheila would lie and steal frequently. *Id.* at 148. **Sheila "would beat the tar out of [Erick and Emily] and they were punished harshly for any little thing they did."** *Id.* at 148. Erick and Emily were forced to stand in the corner for hours. Sheila would go out and party for days at a time, leaving her kids with her dad while she was gone. *Id.* Erick was malnourished as a kid; his granddad once noticed his "stomach sticking out just like the starving kids Floyd saw on television. His arms and legs were very thin and he was not very responsive." *Id.* After Erick moved in with his grandparents his stomach stopped swelling and he became more responsive. *Id.* at 149. Sheila never showed Erick or Emily any love. *Id.* Rather than let Erick and Emily play with other children, Sheila made Erick and Emily stay inside and clean the house. Sheila would sometimes lock Erick and Emily in the closet for hours. *Id.* "It was like Sheila wanted them to suffer and wanted to punish them for some

reason. *Id.* at 150. **Rosa was never contacted by anyone from the defense team.** *Id.*

- Sandra Kay Vargas is the daughter of Rosa Carter Nash. She confirmed that Sheila was a wild teenager, who would sneak out of the house to see boys and who would fight with her mother. *Id.* at 150. When Erick was a boy he did not have enough food to eat, and Sandra actually witnessed several occasions where Sheila was extremely abusive to Erick. Once, when Erick was four or five, Erick spilled some of his breakfast causing Sheila to jerk "him off the floor by the arm" and beat him "in the back with her fist." *Id.* Sandra confirmed that Erick and Emily were forced to stand in the corner for hours with their heads against the wall and also forced to stay in the closet for hours. *Id.* at 151. When Erick was 12 his mother kicked him out of the house, Sandra found Erick living on the streets. By the time he was 15 Erick was tough as nails and had a dead look in his eyes. *Id.* Sheila would not let Sandra take Erick and Emily because she was collecting welfare money she did not want to give up. *Id.* **Sandra was never contacted by anyone from Erick's defense team.** *Id.* at 152.

- Ethel Fay Jones is Sheila Jones's older sister. She confirmed that Sheila pursued Mario, and that she would sneak out of the house to spend time with him. *Id.* at 155-56. She was already sexually active when she began seeing Mario. *Id.* at 156. Indeed, Sheila's father

had no idea that she was sexually active until she became pregnant. Sheila was lying about being sold to Mario. *Id.* After Sheila met Santos and they began living together Erick and Emily were treated like outcast. *Id.* at 157. Ethel also recalled arguing with Sheila about her treatment of Erick and Emily. She remembered them being forced to stand in the corner all day. *Id.* They were only permitted to move to use the bathroom. Ethel remembered seeing **"permanent stains where Erick had cried on the wall and marks where his forehead had been pressed against the wall for so many hours."** *Id.* at 157. She would also slap and belittle Erick and Emily, although she would not do this to her other children. Sheila took her children out of school because she is lazy and wants them to do what she wants done, this is necessary because "God told her He does not want her to work." *Id.* at 158. Ethel once watched Sheila slapping Erick and kick him off the porch, he landed on his head. *Id.* Once she was talking with Erick and Sheila came up and slapped him for no reason. *Id.* at 159. At one point, **Sheila told Emily "I could have killed you two a long time ago"** and they were not sure what she meant by that, if she meant have them aborted or actually killed them. *Id.* at 158.

- Linda Jones Mireles is Erick's cousin and Sheila's niece. She once lived with Erick and Emily and saw how Sheila made them constantly clean the house. *Id.* at 163. Sheila would also tell Erick and Emily that she hated them. *Id.* Linda saw the tear streaks on the

wall from Erick and Emily had been standing for so long. *Id.* at 164. Erick felt like the gang was his family, when his mom kicked him out the older gangster took him in. *Id.* Erick's life never included having any fun. *Id.* at 165. **Linda was not contacted by any members of the defense team before Erick's trial.** She would have testified had she been contacted. *Id.*

- Elizabeth Olivas is Santos Olivas sister. Santos was Erick and Emily's step dad. She explained that Sheila acted like a "queen" and made Erick and Emily do all the work around the house. "If Erick or Emily ever complained about the abusive environment, Sheila would harshly punish them with physical violence." *Id.* at 168. She also explained that Sheila was a very violent person. *Id.* **Elizabeth was never contacted by the defense team**, but would have explained the effects Sheila had on her children if given the chance. *Id.* 169.

All of this information was included in various affidavits included in a lengthy report compiled by Investigator Tony Knox for David Richards. *See* Writ CR at 21-174.

Rather than include this information in his writ, and call the witnesses identified by Knox to the state court hearing, state writ counsel simply filed a boilerplate writ and attached Knox's complete report as an exhibit. *See* Writ CR at 2-174.

G. The state trial court adopts the state's findings of facts and conclusions of law.

After the hearing in this case, the trial court adopted the state's proposed findings of fact and conclusions of law verbatim, with the exception of two sentences. *See* Writ CR at 299-352.[2] Below, Davila will explain how the adopted findings of fact and conclusions of law are rife with factual and legal errors.

GENERAL DISCUSSION OF CAPITAL PUNISHMENT LAW IN TEXAS

The following is an overview of capital punishment law in Texas. This summary is provided simply as a general guide; not all capital murder trials follow this pattern.

The Texas Legislature has designated certain types of murders as eligible for the death penalty. To warrant the death penalty, the defendant must have committed another serious crime in addition to committing a murder. For instance, kidnapping and then killing a person is a capital offense. So is killing two people, rather than one, which happened in the present case.

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[2] The trial court's findings of facts and conclusions of law did not include proposed factual finding 75 or proposed legal conclusion 10, other than those two sentences, the states entire proposed findings of fact and conclusions of law was adopted by the trial court. *See* Writ CR at 308, 311,338, 342.

In recent years, once a person is indicted for capital murder and the State decides to pursue the death penalty, the defendant is assigned two attorneys. One of the lawyers is the lead attorney; the other is the second chair attorney. Both attorneys are charged with investigating the case, filing motions, selecting the jury, and arguing as forcefully as possible for a not guilty verdict or a lesser conviction than capital murder, or if all else fails, for a life sentence.

The district attorney's office will equally prepare, usually assigning two, sometimes three, prosecutors to the case, along with one or two investigators and paralegals.

Lawyers for the defendant will usually file a large number of pretrial motions. The reason for this is because the state and federal law requires all issues raised on appeal to be first presented to the trial judge. Death penalty jurisprudence is thick with constitutional and statutory issues. All unsettled challenges to death penalty procedures must be raised. Failing to raise an issue means that it is waived on direct appeal. Moreover, because the Supreme Court has insisted that effective assistance of counsel requires attorneys who are knowledgeable about death penalty litigation, the failure of trial lawyers to raise important issues at trial for later review on appeal can lead accusations that the trial lawyers were ineffective.

In a capital case, the trial judge will hold several pretrial hearings on motions by the State and defense.

The judge will address motions to suppress, constitutional challenges, and hearings on the qualifications of experts. Any defense requests denied by the judge are preserved for appeal.

Texas adheres to individual voir dire of potential jurors. Generally, a large number of veniremen are summoned to the courthouse, around 600 or 700. Many jurors exercise certain allowable rights not to serve; others cannot be found. On appearance day, about 300 jurors or so will show.

The trial judge will perform the initial qualification of the jury panel. Either side may ask for the jury to be shuffled at this point. Jurors will be seated randomly in numerical order. Beginning with juror number one, the first twelve jurors who are not struck or removed for cause will constitute the jury.

The judge will screen out those who cannot speak and write English, who have felony or moral turpitude convictions, and those who are entitled to legitimate legal exemptions from service. In addition, the judge will hear explanations about physical disability, business conflicts, general biases, or other personal issues that might disqualify a juror. The judge may excuse some jurors but not others. At this stage, the attorneys for both sides have minimal input, other than a few questions for individual jurors called to the bench. Frequently, the lawyers for both sides will agree to excuse a juror for some reason. There is a certain Texas statutory provision that allows lawyers on both sides to agree to excuse a juror.

Qualifying the jury to this point is a difficult, day-long affair. Once the venire is qualified for general jury service, they are scheduled for individual voir dire examination. Generally in groups of five to ten, they are instructed to return to court over the next three to four weeks, for individual questioning about their views on the death penalty.

When each juror arrives on his designated day, each side is generally allowed approximately 45 minutes to question the juror. After the juror leaves, each side is permitted to challenge for cause. If granted, the juror is finally excused and deleted from the pool. If challenges for cause are denied, the juror remains in the pool and subject to a peremptory challenge or to become part of the twelve-member petit jury.

There are two methods in Texas for permitting peremptory challenges. For many years, judges required peremptory challenges to be exercised immediately after the juror is questioned individually and challenges for cause denied. This is sometimes called the sequential method of selecting the jury. The State goes first. If the State strikes the juror, the juror is gone. If the State declines to strike the juror, then the right passes to the defense. If the defense strikes the juror, the juror is eliminated. If the defense does not strike the juror, then the juror joins the twelve-member petit jury. This process is repeated until twelve jurors and two alternates are seated. Each side has ten peremptory challenges.

Once the jury is selected and sworn, trial proceeds in the usual fashion. If the defendant is found guilty of capital murder, the sentencing phase begins. In response to the Supreme Court's insistence that the jury decision-making process be guided, Texas has constructed three questions, called special issues. The questions have varied over the years. In Davila's case, only two questions were asked: the future dangerousness question and the mitigation question.

The method of answering the special issues is complicated. If the jurors unanimously answer both questions in the State's favor, as they did here, then the judge sentences the defendant to death automatically. If the jurors answer *unanimously* any one of the questions in the defendant's favor, then the judge will sentence the defendant to life in prison.

Jurors are also told that in order to answer any special issue in the defendant's favor, at least ten of the jurors must agree.

The jurors are *not* told certain outcomes. It is possible that the jurors might fail to agree *unanimously* on the answer in the State's favor to any special issue. If this occurs, then the defendant is sentenced automatically to life in prison. There is no retrial. Unlike in any non-capital case, a hung jury does not result in a retrial in the sentencing phase of a capital case. The result is always either a life sentence or a death sentence. Jurors, however, are not told this.

As a corollary, jurors are also not told that a single juror can decide in favor of a life sentence. Unanimity

is required for a death sentence. A life sentence is the result otherwise, and can be the result of a single juror's decision.

Moreover, jurors are not told what occurs if fewer than twelve jurors agree on an answer to a special issue in the State's favor, but fewer than ten jurors agree on an answer in the defendant's favor. Again, the answer is that the defendant receives an automatic life sentence.

Once the judge pronounces the death sentence and signs the judgment, appeal is automatic to the Texas Court of Criminal Appeals ("CCA"). At the same time that the trial judge appoints an appellate lawyer, the judge will also appoint an attorney to file the defendant's Article 11.071 application for state writ of habeas corpus. The state writ must be filed shortly after the state direct appeal brief is filed, before the CCA decides the appeal. If the direct appeal is affirmed, the defendant has the right to appeal to the United States Supreme Court. Once the CCA denies the direct appeal and the state writ application, the inmate must proceed to federal district court.

GENERAL DISCUSSION OF FEDERAL HABEAS CORPUS

As this application for a writ of habeas corpus arises out of a state proceeding which violated the Constitution of the United States it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(a). Under

AEDPA, "a federal court cannot grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Hughes v. Dretke*, 412 F.3d 582, 588-89 (5th Cir. 2005) (citing 28 U.S.C. § 2254(d)).

The "contrary to" and "unreasonable application" clauses under section 2254(d)(1) have independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Under the "contrary to" clause a state court decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court" if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir. 2002) *(quoting Williams*, 529 U.S. at 405-06).

Under the second clause, "a state court decision is 'an unreasonable application of clearly established' Supreme Court precedent if the state court 'correctly identifies the governing legal rule but applies it

unreasonably to the facts of a particular prisoner's case.'" *Foster*, 293 F.3d at 776 (*quoting Williams*, 529 U.S. at 407-08). This Court considers a state court "decision to be 'an unreasonable application' of Supreme Court precedent in three situations:

> [(1)] the state court . . . unreasonably applies [the correct governing legal rule] to the facts of the particular [] case . . . [(2)] the state court [] unreasonably extends a legal principle from our precedent to a new context where it should not apply or [(3) the state court] unreasonably refuses to extend that principle to a new context where it should apply."

Sprouse v. Stephens, 13-70018, 2014 WL 1356973 (5th Cir. 2014) (*citing Williams*, 529 U.S. at 407).

Importantly, although AEDPA requires a federal court to review a state court judgment with some degree deference, AEDPA in no way renders a federal judge powerless to reverse a state court judgment rendered in violation of the Federal Constitution. The Supreme Court made this clear in *Williams v. Taylor*:

> In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody – or, as in this case, his sentence of death – violates the Constitution, that independent

> judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.

Williams v. Taylor, 529 U.S. 362, 389-90 (2000).

A federal court may also grant habeas relief when the state court's adjudication of a claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C.A. § 2254(d)(2). Once again, although this standard is demanding it is "not insatiable," as the Supreme Court has explained, "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

ARGUMENT AND AUTHORITIES

Overview of Claims for Relief

CLAIM ONE: The Evidence Was Legally Insufficient To Sustain Davila's Conviction for the Offense of Capital Murder Under Texas Penal Code 19.03(a)(7)

Because the State Failed to Prove That Davila Intended to Kill More Than One Person

CLAIM TWO: Trial Counsel Rendered Ineffective Assistance of Counsel for Failing to Properly Investigate and Present the Mitigation Case

CLAIM THREE: Davila Was Denied Effective Assistance of Counsel During His Direct Appeal in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution By Appellate Counsel's Failure to Recognize, and Raise The Claim, That He Was Convicted by An Improper Statement of Law in the Jury Instructions

CLAIM FOUR: State Habeas Counsel Rendered Ineffective Assistance Counsel

CLAIM FIVE: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to Franks v. Delaware, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CLAIM SIX: The Trial Court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to Franks v. Delaware, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CLAIM SEVEN: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CLAIM EIGHT: The trial court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CLAIM NINE: The Trial Court Erred In Overruling Davila's Motion to Preclude the Death Penalty As A Sentencing Option and Declare Tex. Crim. Proc. Code 37.071 Unconstitutional On the Grounds That Texas Law Allows For A Death Sentence Without Grand Jury Review of the Punishment Special Issues in violation of the Fifth and Fourteenth Amendments

CLAIM TEN: The Trial Court Erred in Overruling Davila's Objection to the Constitutionality of Texas's So-Called "10-12 Rule"

CLAIM ELEVEN: The Trial Court Erred in Overruling Davila's Motion to Instruct the Jury That the Sentencing Burden of Proof on the Mitigation Issue Lies With the State

THE FOLLOWING TWO CLAIMS HAVE BEEN ABANDONED:

CLAIM TWELVE: Davila's Trial Was Contaminated By Improper Influence That Affected the Deliberations Process (This Claim has been abandoned.)

CLAIM THIRTEEN: Davila's conviction and sentence were obtained in violation of *Brady* (This Claim has been abandoned for the reasons explicated underneath this claim at the end of our writ).

DETAILED ARGUMENTS

CLAIM ONE: The Evidence Was Legally Insufficient To Sustain Davila's Conviction for the Offense of Capital Murder Under Texas Penal Code 19.03(a)(7) Because the State Failed to Prove That Davila Intended to Kill More Than One Person

Exhaustion: This Claim was raised as point of error one in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that court. *See Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011).

On direct appeal to the Court of Criminal Appeals, Davila argued that the evidence was legally insufficient to support his conviction for capital murder because the facts established at trial showed he only intended to shoot one person, Jerry Stevenson, a.k.a. Big Boy Dooney. *Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. Jan. 26, 2011). Davila was prosecuted under a construction of capital murder that requires the intent to kill two or more people. As Davila intended to shoot only one person, he could not have been guilty of capital murder. The Court of Criminal Appeals disagreed, and based on their reading of the record found that Davila had the intent to kill more than one person. Interestingly, the jury apparently agreed with Davila's argument. A note from the jury shows that the jury recognized Davila intended to harm only Jerry Stevenson, but an incorrect jury charge allowed them to convict Davila despite the

state's failure to prove the necessary intent requirement. *See* Claim Three, *Infra.*

I. Capital murder requires the specific intent to kill two people.[3]

The evidence presented at trial was legally insufficient to support Davila's conviction for the offense of capital murder because he lacked the requisite intent to kill more than one person. Stated another way, the evidence raised at trial showed that Davila intended to shoot only Jerry Stevenson, the only adult male present at the scene of the shooting, and no one else.

In order to assess the sufficiency of the evidence, a court must consider whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 308 (1979). As Davila was charged with capital murder for causing the death of two individuals, one essential element to be proven was that he had the specific intent to kill at least two individuals. *Davila*, 2011 WL 303265 at 12-13 (citing *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008)). As the Court of Criminal Appeals has explained:

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[3] Davila recognizes that there are multiple forms of capital murder in Texas, but Davila was only tried for capital murder based on the deaths of two people during the same criminal transaction. *See* 2 RR 3-7.

> Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane.

Roberts v. State, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008). *Roberts* made clear that Texas' transferred intent doctrine cannot be used to increase murder to capital murder on the grounds that the defendant, while intending to kill a single person, actually kills two. *Id.*

II. The evidence at trial showed Davila intended to shoot Jerry Stevenson.

The motive for Davila's actions, clearly demonstrated at trial, and the only scenario that passes the common sense test, was that Davila, a Truman Street Blood, had a grudge against Jerry Stevenson, a member of the Polywood Crips. Three weeks before this offense, Stevenson and Davila had been involved in a separate verbal altercation, again presumably due to their oppositional gang affiliations. 19 RR 61-80. Throughout the trial, the prosecution enthusiastically and repeatedly emphasized to the jury the bitter enmity between the Bloods and the Crips. 16 RR 136-38, 146-70; 18 RR 31-70.

The state's eye witness, Eghosa Ogierumwense, watched as Davila specifically targeted only Jerry Stevenson with his laser sight. 14 RR 138,144-45. One of the wounds sustained by Annette Stevenson was intermediate, meaning that it had struck other targets before entering her body. 18 RR 265-73. The weapon utilized in this offense was described as high-powered. 18 RR 158-59. With the ammunition used in it, the muzzle velocity was great. *Id.* Extrapolating from the testimony of the forensic firearms examiner, the bullets used in the rifle at the approximate range where Davila was standing were capable of traveling through outside walls. Additionally, evidence was developed at trial revealing that Davila's far away vision was exceedingly poor (20/140 in his right eye and 20/80 in his left) and that he did not wear corrective lenses. 19 RR. 96-102.

Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42-43. The scene of shooting was in a part of Fort Worth known at the time as "Blood" territory. *See, e.g.*, 14 RR 189. It was undisputed at trial that Erick Davila was a member of the Truman Street Bloods gang. 16 RR 54-64. Jerry Stevenson testified that he was not a gang member, but that he hung around many gang members. 15 RR 92-95. Specifically, he said he had friends who were Polywood Crips, but he denied being a Crip himself. *Id.* at 72. However, Stevenson also recognized that the house where he lived (the same house where the shooting took place), was probably identified as a Crip house. *Id.* at 92-95. He further acknowledged that it

could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

It is apparent, in light of the state's developed motive for this shooting, that Davila's sole intent was to kill Jerry Stevenson. Though motive itself is not an element that the prosecution is required to prove, Texas courts have recognized that "evidence of motive is one kind of evidence [that aids in] establishing proof of an alleged offense." *See Crane v. State*, 786 S.W. 2d 338, 349-50 (Tex. Crim. App. 1990); *see also Pollard v. State*, 255 S.W. 3d 184, 188 (Tex. App. – San Antonio 2008) *pet. granted and aff'd*, 277 S. W. 3d 25 (Tex. Crim. App. 2009).

Davila had no dispute with any other person present at the party. Davila fired at Jerry Stevenson; unfortunately, he was a bad shot with bad eyesight and two innocent people were killed by accident. The facts presented at trial were simply legally insufficient to support a charge of capital murder pursuant to Texas Penal Code § 19.03(7)(a).[4]

A note sent by the jury toward the end of their deliberation showed they believed Jerry Stevenson was the only target: "In a capital murder charge, are you

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[4] Although direct appellate counsel did raise the sufficiency issue, she completely failed to identify the fact that the trial court incorrectly instructed the jury regarding Texas' transferred intent law as it applied to capital murder. CR at 1933. The Charge given allowed the jury to convict for capital murder if Davila intended to kill one person, but more than one person was actually killed. *Id.* This issue will be raised in the Ineffective Assistance of Direct Appeal Counsel Claim below.

asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others?" CR at 1931. The question clearly established the jury believed Davila intended to murder "a person."

III. The Court of Criminal Appeals' made unreasonable factual findings based on an inaccurate retelling of the trial testimony and the failure to consider relevant evidence.

First, it should be noted that the Court of Criminal Appeals was incorrect that the *jury's verdict* showed Davila "intended to cause more than one death in his 'shoot em up' attack." *Davila*, 2011 WL 303265 at 13. As Davila explains in Claim Three, the jury recognized that he intended to kill only Jerry Stevenson, but the trial court's supplemental jury charge incorrectly allowed Davila's conviction based on the intent to harm a single person.

There were other problems with the Court of Criminal Appeals' factual finding. For example, the court stated that "[Davila] gave a written statement explaining that he intended to 'get the fat dude' and who he mistakenly thought were three guys on the porch." *Id.* at 13. The court used this statement to conclude that Davila intended to kill at least two people, but in doing so the court completed ignored the ample evidence that Stevenson was the only adult male at the birthday party. *See, e.g.*, 15 RR 42-43. Further, the

Court of Criminal Appeals failed to address that Davila also stated he "wasn't aiming at the kids or the woman and don't know where the woman came from." *See* State's Ex. 166. As Davila was not aiming at "the woman" or the kids, and because Jerry Stevenson was the only non-woman and non-kid at the party, it is clear Davila was attempting to harm Stevenson only.

The Court of Criminal Appeals also believed "Cashmonae testified (as did other witnesses) that appellant aimed the 'red dot' at 'different parts of the house' and at different persons." *Davila*, 2011 WL 303265 at 13-14. This summary of Cashmonae's testimony is incorrect. Rather, Cashmonae's testimony concerning the red dot was:

> **Q.** But you did see – you told the jury that you saw a red dot on different parts of the house; is that correct?
>
> **A.** Yes.
>
> **Q.** So was the red – was this red dot going a bunch of places on the house?
>
> **A.** Yes, on the porch.
>
> **Q.** And it went other places besides the porch?
>
> **A.** No.
>
> **Q.** Not that you saw?
>
> **A.** No.

14 RR 43-44. Cashmonae never said she saw the red dot pointed at different persons.

The Court of Criminal Appeals also incorrectly summarized the testimony of Eghosa Ogierumwense. According the court's version of events, "Eghosa said that appellant looked 'frustrated' after the first burst of fire when Jerry or 'Dooney' had escaped into the house, so appellant moved and then fired a second burst at the remaining women and children." *Davila*, 2011 WL 303265 at 14. Once again, the state opinion misstates the facts. Eghosa explained that he could see the beam on Davila's gun on the windows of the house. 14 RR 136. When asked if the beam was anywhere else, he replied "not really." *Id.* Of course, Eghosa also explained that beam was initially on Dooney, but that Dooney walked in the house, this was when Erick started shooting the gun. *Id.* at 138. This establishes that after Stevenson went in the house, Davila started to shoot his gun, and that his gun was aimed at the windows. Clearly, Davila was attempting to shoot Dooney (Stevenson) who had just entered the house. *Id.* The prosecutor made this clear:

> **Q.** Did you see the beam on the women and children?
>
> **A.** No.
>
> **Q.** You never saw the beam on the women and children?
>
> **A.** Nuh-uh.

Id. Eventually the prosecution succeeded in getting Eghosa to change his story slightly:

Q. Let me just ask you this: Did you ever see the beam on the little girl that was on the porch?

A. Huh-uh.

Q. You're saying no, you didn't?

A. No, ma'am.

Q. And do you recall telling us that you did see the beam on the little girl on the porch?

A. Not that I remember.

Q. Do you remember telling us that you saw the beam on the granny? Do you remember that?

A. Yeah.

Q. Okay. So you did see the beam on the grandmother?

A. Yes, ma'am.

Q. So you – so it's fair to say you saw the beam not only on the house, but on the people in front of the house?

A. Yes, ma'am.

Id. at 146-47. The defense cleared up the inconsistency on cross examination:

Q. And in your statement that you gave, you said that you saw the guy point the rifle at Big Boy; is that right?

A. Yes, sir.

Q. And then at some point, Dooney, or Big Boy – do you also know him as Jerry Stevenson?

A. Yes, sir.

Q. Mr. Stevenson walked into the house, correct?

A. Yes, sir.

Q. And this person lowered the gun; is that right?

A. Yes, sir.

Q. Now, you said the beam was on or around Big Boy at one point?

A. It was on him.

Q. It was on him. And no shots were fired?

A. No, sir.

Q. All right. Big Boy walks into the house. And then I believe what you say is is that in your statement, and correct me if I'm wrong, he raises the gun back up, and he just starts shooting at the house, correct?

A. Yes, sir.

Q. That's what you said. There's just shots going everywhere; is that fair to say?

A. Yes, sir.

Q. And you told Ms. Burks initially, now, you told her initially that beam was not on the grandma or the mom and the

children, right? That's what you told Ms. Burks first.

A. No.

14 RR 156-57. Further, defense counsel pointed out that in his statement to the police, Eghosa "never mentioned the beam being on the granny or the children." *Id.* at 159. Instead, Eghosa had told the police "whoever was shooting just started shooting at the house." *Id.* Indeed, Eghosa never remembered the beam being on "Granny" until he met with the Tarrant County District Attorney's office. *Id.* Finally, Eghosa confirmed "[t]hat night [he] only saw the shooter raise the gun and start shooting at the house." *Id.* at 160.

It is unclear how this testimony can support the factual finding that that Davila "moved and then fired a second burst at the remaining women and children." For these reasons, the Court of Criminal Appeals' decision was based on an unreasonable determination of the facts.

IV. Conclusion

As the Court of Criminal Appeals' adjudication of this claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at trial, this Court should grant Davila's Writ and free him from his unconstitutional conviction and sentence.

CLAIM TWO: Trial Counsel Rendered Ineffective Assistance of Counsel for Failing to Properly Investigate and Present the Mitigation Case

Davila's trial attorneys failed to identify and present evidence of severe physical and psychological abuse which Davila suffered at the hands of his mother. They also failed to show that Davila was kicked out of the house at a young age, and while living on the streets was introduced to the gang culture. This powerful mitigation evidence not discovered by the defense team was discovered by mitigation expert Toni Knox during the state writ proceedings by simply interviewing Davila's family members. The abuse uncovered by Knox and presented in her mitigation report far exceeded that presented to the jury at Davila's trial. Indeed, at trial the picture painted for the jury was one of a kid who needed medication for ADHD, had behavior and learning problems, and needed glasses. The evidence that should have been discovered and presented to the jury would have shown that Erick Davila was raised in a house without love, by a mother who treated him like a servant, and who would lash out physically against her children when they did not comply with her demands. Had the trial attorneys followed the minimum standards established by the American Bar Association for death penalty representation, they would have hired their own mitigation expert; however, no mitigation expert was hired by the trial team. Had the jury been presented with this evidence, it is likely that at least one of the jurors would

have refused to answer the special issues in such a way as to result in a death sentence.

This claim was presented to the state district court, which adopted the state's proposed findings of facts and conclusions of law almost in their entirety. By doing so, the state court rendered a decision which was contrary to and an unreasonable application of clearly established federal law, and a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

I. The Law

There are two venerable elements to an ineffective assistance of counsel claim. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (2003). "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Harrison v. Quarterman*, 496 F.3d 419, 424 (5th Cir. 2007) (citing *Strickland*, 466 U.S. at 690-91). "The Supreme Court has described 'the standards for capital

defense work articulated by the American Bar Association (ABA)' as 'standards to which we long have referred as 'guides to determining what is reasonable.'" *Mason v. Mitchell*, 543 F.3d 766, 774 (6th Cir. 2008) (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

In *Wiggins*, the Supreme Court made it clear that merely investigating some aspects of capital defendant's background "did not excuse [the attorneys] from their duty to make a 'fully informed and deliberate decision' about whether to present a mitigation case." *Wiggins v. Smith*, 539 U.S. 510, 519 (2003). "In fact . . . their knowledge triggered an obligation to look further." *Id.* When reviewing counsel's failure to investigate particular leads, the correct assessment is whether counsel's decision not to pursue those leads "actually demonstrated reasonable professional judgment." *Id.* at 527.

The Supreme Court cemented the idea that counsel must investigate "all reasonably available mitigating evidence" in *Rompilla v. Beard*. 545 U.S. 374, 387, n. 7 (2005). In *Mason v. Mitchell*, the Sixth Circuit succinctly explained the holding in *Rompilla*:

> The Supreme Court's decision in *Rompilla* offers a similar example regarding the obligation of counsel to conduct an investigation into "*all reasonably available* mitigating evidence" that includes efforts to gain information from *both* state records *and* family members. *Id.* at 524, 123 S.Ct. 2527 (quotation omitted). In *Rompilla*, the Court noted that Rompilla's counsel did *some* investigation,

which "includ[ed] interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase." *Rompilla*, 545 U.S. at 381, 125 S.Ct. 2456. The Court even observed that "Rompilla's own contributions to any mitigation case were minimal," that Rompilla at times seemed to "send [] counsel off on false leads," and that "counsel spoke to the relatives in a 'detailed manner,' attempting to unearth mitigating information." *Id.* (quotation omitted).

Although Rompilla's counsel certainly conducted some investigation into his background, the Court held that Rompilla's counsel were deficient because they failed to consult available public records relating to Rompilla's prior convictions. *Id.* at 382-90, 125 S.Ct. 2456. In particular, the Court faulted Rompilla's counsel for failing to review records relating to a conviction for rape and assault given the prosecutor's announced plan to use that conviction as a central part of the state's attempt to prove an aggravating factor. *Id.* at 383-84, 388-89, 125 S.Ct. 2456. The Court reasoned that "[i]t flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking." *Id.* at 389, 125 S.Ct. 2456. The Court further stated that "[i]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no

> other source had opened up," *Id.* at 390, 125 S.Ct. 2456, and the Court concluded that "[f]urther effort [to research those leads] would presumably have unearthed much of the material postconviction counsel found, *including testimony from several members of Rompilla's family, whom trial counsel did not interview*," *Id.* at 391, 125 S.Ct. 2456 (emphasis added).

Mason v. Mitchell, 543 F.3d 766, 775-76 (6th Cir. 2008).

In addition to deficient performance, "the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Under *Strickland*, in order to show prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In assessing prejudice, a court must reweigh the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. at 534. Both the mitigation evidence presented at the trial and that uncovered on habeas should be considered in reviewing prejudice. *Sears v. Upton*, 561 U.S. 945, 945 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears

would have received a different sentence after a constitutionally sufficient mitigation investigation.").

Because a single juror can prevent a death sentence in Texas, the proper inquiry in this case is whether there is a reasonable probability that "at least one juror would have struck a different balance" had they been presented with a complete view of Erick Davila's childhood. *Wiggins*, 539 U.S. at 537. Finally, it should be noted that the Supreme Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." *Sears v. Upton*, 561 U.S. 945 (2010). Indeed, the Court has "found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* (citing, e.g., *Williams*, *supra*, at 398, (remorse and cooperation with police); *Rompilla v. Beard*, 545 U.S. 374, 378 (2005) (residual doubt)).

II. The Facts – Trial counsel failed to comply with the standards articulated by the American Bar Association, and as result, failed to uncover powerful mitigation evidence.

Davila's trial counsel failed to comply with the standards articulated by the American Bar Association by failing to investigate all relevant evidence, by failing to hire a mitigation expert and instead shouldering primary responsibility for the mitigation investigation

themselves, and by failing to identify and interview multiple family members familiar with Davila's past. Trial counsel's deficient performance resulted in the jury being presented with a woefully incomplete and misleading picture of Davila's life.

A. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases[5]

The introductory commentary to the 2003 ABA guidelines make it clear that trial counsel in a capital case "must promptly obtain the investigative resources necessary to prepare for both phases, including at *minimum the assistance of a professional investigator and a mitigation specialist*, as well as all professional expertise appropriate to the case." http://ambar.org/2003Guidelines, at 925. Guideline 4.1 explains the necessary components to a capital defense team. *Id.* at 952. In addition to two qualified attorneys, the defense should include "an investigator, and a mitigation specialist." *Id.* The commentary to this guideline explains

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[5] A copy of these guidelines is available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.authcheckdam.pdf. Because Davila's trial took place in 2009, the 2003 version of the guidelines will be used, as well as the 2008 supplement to the guidelines, which can be found at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2008_July_CC1_Guidelines.authcheckdam.pdf. Citations to the two guidelines will correspond to the page numbers at the top right corner of the of the guidelines themselves.

that "[a]lthough some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the *prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation.*" *Id.* at 958. The reason is simple: "Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness." *Id.* at 958.

In addition to the specially trained investigator, "[a] mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings." *Id.* at 959. The guidelines explain that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed." *Id.* The mitigation specialist fulfills many important roles for the defense team:

> The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's

> life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Id. In short, "the use of mitigation specialists has become part of the existing standard of care in capital cases, ensuring high quality investigation and preparation of the penalty phase." *Id.* at 960 (internal quotation removed). A defense team including "two attorneys, a fact investigator, and a mitigation specialist" (along with a person who is able to screen individuals for mental or psychological disorders or defects) "is the minimum" allowed under the prevailing norms at the time of Davila's trial. *Id.* at 1003.

The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases further expounds upon the role of the mitigation specialist. *See ABA Supp. Guidelines*, 36 Hofstra L Rev. 677 (2008).[6] "The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client

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[6] Available at:

http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2008_July_CC1_Guidelines.authcheckdam.pdf

in order to aid counsel in developing an affirmative case for sparing the defendant's life." *Id.* at 683.

ABA Guideline 10.11, addressing the defense case concerning penalty, explains that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." http://ambar.org/2003Guidelines, at 1055. The commentary to Guideline 10.11 explains the importance of finding lay witnesses to establish the foundation for the mitigation case: "Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions. Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility." *Id.* at 1062. Further, "[f]amily members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants." *Id.* Indeed, the 2008 supplement clarifies that Guideline 10.11 compels the defense team to contact lay witnesses, including "[t]he client's family, extending at least three generations back, and those familiar with the client." *See ABA Supp. Guidelines*, 36 Hofstra L Rev. 677, 691 (2008) ("Guidelines 10.11 – The Defense Case: Requisite Mitigation Functions of the Defense Team").

B. Trial Counsel's deficient performance at the punishment hearing

As explained by Toni Knox in her mitigation report, the defense team appeared to be confused concerning the mitigation specialist role. Writ CR at 25, 28-34. Some of the team members believed that Dr. Fallis "would be conducting the larger mitigation investigation, including collateral interviews, and documenting [Davila's] social history." *Id.* at 26. However, according to attorney Joetta Keene's affidavit, Dr. Fallis' role was simply to "present our mitigation case to the jury. She was not hired as a mitigation investigator." *Id.* at 273. "She formed her opinion by reviewing all of the documentation and records we gave her and by interviewing Erick Davila, his family and friends and anyone we sent her to interview."

In her testimony at the state writ hearing, attorney Joetta Keene explained that she and lead counsel Robert Ford "did not want to delegate the mitigation case." 2 Writ RR at 97. They performed the mitigation investigation themselves. *Id.* Mrs. Keene's testimony was that the investigation of Erick's defense "took us about a week." *Id.* at 101. On cross examination, Mrs. Keene explained that investigator Gary Cooper was the investigator for guilt and innocence. *Id.* at 139. She also reaffirmed that Dr. Fallis was not a mitigation investigator and was not used in that capacity. *Id.* at 140. Amazingly, Mrs. Keene volunteered that she did not know what was meant by the term "mitigation specialist." *Id.* Mrs. Keene also admitted that she and Mr. Ford did not even know that some of the family

members who provided mitigating evidence to Toni Knox existed. *Id.* at 145. The thrust of Mrs. Keene's testimony is that she and attorney Robert Ford did not hire a mitigation investigator or specialist to focus on the mitigation the case. Considering the wealth of evidence uncovered by mitigation specialist Toni Knox preparing her report for the state writ proceedings, evidence not found or presented by the trial attorneys, it is clear that the attorneys' failure to hire a mitigation specialist hurt Davila's case.

As explained in the fact section, *supra*, the defense's punishment case began with Erick's father testifying. Mario Davila explained that he was serving a 20-year sentence for murder, that he was 28 when he impregnated Erick's mom Sheila, who was 13 at the time, and that he had been in prison for almost all of his children's life. 23 RR at 219-240. On cross examination, he explained that Sheila was good mom who had a support system to help her raise her kids. *Id.* at 249-251. Erick's twin sister Emily testified that her mother kicked her out of the house when she was 16, that Erick was kicked out when he was 15, and that she and her mom had been in physical fights before. 24 RR at 11-30. No mention was made of severe mental or physical abuse.

Sheila Olivas, Erick's mom, explained the circumstances surrounding her pregnancy at age 13, that she was a poor teenage mother, and that her sister would help support her family. *Id.* at 48-60. Although she thought she was an overprotective mother, she did admit that she never went to see her son in jail until six

weeks after his arrest, and that she was too busy to meet with his attorneys. *Id.* at 60-80. The defense established she would not have even showed up for trial, but she was threatened with arrest if she failed to do so. *Id.* at 91-94. On cross examination, Sheila claimed that she did everything she could for her son, and that his problems in school came from the fact that "you had to touch him for him to focus." *Id.* at 97-99. No mention was made of physical or mental abuse. Indeed, none of the family members called to testify mentioned anything about poor nutrition, physical abuse, or mental abuse in Erick's life.

Dr. Fallis was the main mitigation witness. She established that Erick had behavior problems from a young age, that he did not play sports as a kid, and that he had borderline IQ scores. *Id.* at 191-200. She believed that Erick's education had been neglected by Sheila because she did not make him wear glasses or take his ADHD medicine. *Id.* at 231-32. Dr. Fallis also explained that Erick's stepfather had beaten his mother, and that Erick had witnessed this abuse. *Id.* at 247. Dr. Fallis did her best with the limited information she had to put Erick's life into context.

C. Mitigation Specialist Toni Knox uncovers a wealth of mitigation evidence.

In her report prepared for the state habeas proceedings and submitted to the state habeas court, Toni Knox identified a wealth of mitigation evidence never discovered by Davila's trial team. This information was

described in Knox's report, the relevant portion of which can be found at pages 34-56 of the writ clerk record. Writ CR at 34-56. Toni Knox swore to the contents of her report, which concluded that "one of the most critical themes regarding the abuse and neglect by Erick's mother was lost due to the lack of investigation." Writ CR at 55-56. As an appendix to her report, Knox included sworn affidavits from family members and investigators who interviewed family members detailing Erick's horrible childhood. *See Id.* at 145-174.

The new evidence found by Knox is discussed in detail in the fact section, supra, and is reproduced here:

- Rosa Nash Jones, Erick's step-grandmother, and Sheila's step-mother, explained that Sheila had always been a trouble maker, even going so far as to fist fight her step-mother at the age of 12. Writ CR at 147. Instead of being sold as a virgin to Mario Davila, Sheila was already sexually active and had been sneaking out of her house and engaging in sexual relations prior to her relationship with Mario (meaning that Sheila lied to her teenage son, Erick, concerning his being conceived by rape). *Id.* Sheila would lie and steal frequently. *Id.* at 148. **Sheila "would beat the tar out of [Erick and Emily] and they were punished harshly for any little thing they did."** *Id.* Erick and Emily were forced to stand in the corner for hours. Sheila would go out and party for days at a time, leaving her kids with her dad while she was gone. *Id.* Erick was malnourished as a kid; his

granddad once noticed his "stomach sticking out just like the starving kids Floyd saw on television. His arms and legs were very thin and he was not very responsive." *Id.* After Erick moved in with his grandparents his stomach stopped swelling and he became more responsive. *Id.* at 149. Sheila never showed Erick or Emily any love. *Id.* Rather than let Erick and Emily play with other children, Sheila made Erick and Emily stay inside and clean the house. *Id.* Sheila would sometimes lock Erick and Emily in the closet for hours. *Id.* "It was like Sheila wanted them to suffer and wanted to punish them for some reason." *Id.* at 150. Rosa was never contacted by anyone from the defense team. *Id.*

- Sandra Kay Vargas is the daughter of Rosa Carter Nash. She confirmed that Sheila was a wild teenager, who would sneak out of the house to see boys and who would fight with her mother. *Id.* at 150. When Erick was a boy he did not have enough food to eat, and Sandra actually witnessed several occasions where Sheila was extremely abusive to Erick. *Id.* Once, when Erick was four or five, Erick spilled some of his breakfast causing Sheila to jerk "him off the floor by the arm" and beat him "in the back with her fist." *Id.* Sandra confirmed that Erick and Emily were forced to stand in the corner for hours with their heads against the wall and also forced to stay in the closet for hours. *Id.* at 151. When Erick was 12, his mother kicked him out of the house, and Sandra found Erick living on the streets. *Id.* By the time he was 15 years old, Erick was

tough as nails and had a dead look in his eyes. *Id.* Sheila would not let Sandra take Erick and Emily because she was collecting welfare money she did not want to give up. *Id.* Sandra was never contacted by anyone from Erick's defense team. *Id.* at 152.

Ethel Fay Jones is Sheila Jones's older sister. *Id.* at 155. She confirmed that Sheila pursued Mario, and that she would sneak out of the house to spend time with him. *Id.* at 155-56. She was already sexually active when she began seeing Mario. *Id.* at 156. Indeed, Sheila's father had no idea that she was sexually active until she became pregnant. *Id.* Sheila was lying about being sold to Mario. *Id.* After Sheila met Santos and they began living together, Erick and Emily were treated like outcasts. *Id.* at 157. Ethel also recalled arguing with Sheila about her treatment of Erick and Emily. *Id.* She remembered them being forced to stand in the corner all day. *Id.* They were only permitted to move to use the bathroom. *Id.* Ethel remembered seeing "permanent stains where Erick had cried on the wall and marks where his forehead had been pressed against the wall for so many hours." *Id.* at 157. She would also slap and belittle Erick and Emily, although she would not do this to her other children. *Id.* at 158. Sheila took her children out of school because she was lazy and wanted them to do what she wanted done; this was necessary because "God told her He does not want her to work." *Id.* Ethel once watched Sheila slapping Erick and then kick him off the porch, and he landed on his head. *Id.* Once,

Ethel was talking with Erick and Sheila came up and slapped him for no reason. *Id.* at 159. At one point, **Sheila told Emily "I could have killed you two a long time ago"** and they were not sure what she meant by that, if she meant have them aborted or actually killed them. *Id.* at 158.

- Linda Jones Mireles is Erick's cousin and Sheila's niece. *Id.* at 163. She once lived with Erick and Emily and saw how Sheila made them constantly clean the house. *Id.* Sheila would also tell Erick and Emily that she hated them. *Id.* Linda saw the tear streaks on the wall from Erick and Emily had been standing for so long. *Id.* at 164. Erick felt like the gang was his family; when his mom kicked him out an older gangster took him in. *Id.* Erick's life never included having any fun. *Id.* at 165. Linda was not contacted by any members of the defense team before Erick's trial. *Id.* She would have testified had she been contacted. *Id.*

- Elizabeth Olivas is Santos Olivas' sister. *Id.* at 168. Santos was Erick and Emily's step dad. *Id.* She explained that Sheila acted like a "queen" and made Erick and Emily do all the work around the house. *Id.* "If Erick or Emily ever complained about the abusive environment, Sheila would harshly punish them with physical violence. *Id.* She also explained that Sheila was a very violent person. *Id.* Elizabeth said that she was sorry that the defense team never contacted her, because she would have

explained the effects Sheila had on her children if given the chance. *Id.* at 169.

III. Trial counsel was ineffective for failing to hire a mitigation specialist and for failing to properly investigate Davila's background.

The Supreme Court has repeatedly explained that "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 688. The Court has relied on the ABA guidelines, discussed above, in establishing the prevailing professional norms. *Id.* at 522. The defense team in Davila's case representation was unreasonable because they failed to hire a mitigation specialist who would have uncovered Davila's traumatic childhood.

Counsel was also ineffective for failing to conduct a thorough investigation into Davila's background. The Supreme Court, in *Wiggins*, explained that its holding in *Williams v. Taylor* made this investigation an inescapable duty: "Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the

defendant's background.'" *Id.* (citing *Williams*, 529 U.S. at 396). This precedent comes from *Strickland*, where the Court explained the deference owed to strategic judgments related to the adequacy of an investigation:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. In short, it was unreasonable for the defense team to fail to hire a mitigation specialist[7], and it was unreasonable for the defense

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[7] The Fifth Circuit recently noted that counsel's failure to "hire a mitigation specialist" was relevant in its decision to grant a Certificate of Appealability in *Escamilla v. Stephens*, 12-70029, 2014 WL 1465361 (5th Cir. Apr. 15, 2014) ("Third, counsel declined to hire a mitigation specialist, failed to obtain a psychological evaluation for their client until after trial began, and failed to ensure that the expert evaluating Licho was aware of his family background and social history.").

team to limit their investigation to a few family members who were apparently unable, or unwilling, to divulge the true extent of Davila's horrendous upbringing. This deficient performance was in spite of red flags raised by Davila's mother's refusing to cooperate with the defense team, and Emily Davila's obvious ongoing conflicts with her and Erick's mother.

Nor does the fact that the defense team conducted some investigation bring their representation into the zone of reasonableness. In *Wiggins*, the Court explained that "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* (citing *Strickland*, 466 U.S., at 691). Although the defense team did speak with, and call as witnesses, a few of Davila's family members, their failure to conduct a full mitigation investigation, compounded by their failure to secure the services of a mitigation specialist, cannot be excused as strategic.

Analogous to Davila's case is *Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008), where the Sixth Circuit found defense counsel's mitigation presentation deficient in spite of the fact that counsel met with multiple family members. "Mason's 'claim stem[med] from

counsel's decision to limit the scope of their investigation into potential mitigating evidence' to be presented at the sentencing phase of a capital trial." *Id.* at 772 (quoting *Wiggins*, 539 U.S. at 521). The Sixth Circuit pointed out that the current standards for defense counsel "provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (2d ed. 1989)). The attorneys in *Mason* did conduct an investigation that included "very brief" contacts with members of Mason's family, reviewing records of his criminal history, his involvement with Children Services, and drug treatment programs, and reviewing some educational records. *Id.* at 777. Counsel also met with Mason's wife several times, as well as other family members. *Id.* at 778. However, counsel failed to ever contact several of Mason's relatives. *Id.* The Sixth Circuit went on to decide that counsel's failure to conduct interviews with other relatives constituted deficient performance. *Id.* at 779.

Discussing prejudice, the Sixth Circuit explained that "Mason thus 'has the kind of troubled history that [the Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability,' and we therefore hold that 'had the jury been confronted with this considerable mitigating evidence, there is a reasonable

probability that it would have returned with a different sentence.'" *Id.* at 781 (citing *Wiggins*, 539 U.S. at 534, 536).

Davila was also prejudiced by his trial team's deficient performance. The test for prejudice is whether there is a reasonable probability that "at least one juror would have struck a different balance" had they been presented with a complete view of Erick Davila's childhood. *Wiggins*, 539 U.S. at 537. Davila's case meets that standard, in part, because we know at least one juror was struggling with her vote in the punishment phase. In her affidavit, Joetta Keene explained that she remembered Juror Sabrina Gundy struggling with her decision while sitting on a park bench during a lunch break. Writ CR at 277. Keene explained that she "watch[ed] the older African American woman sit alone. [She] watch[ed] her cry on that park bench. In that moment, [she] knew we were losing our last holdout." *Id.* Mrs. Keene believed it was the jail escape that had cemented a death sentence for Davila, *Id.*, but that idea was surely based on her understanding of the mitigation case, which did not include the palpable evidence of Davila's troubled upbringing.[8]

Importantly, the fact there is some overlap between the evidence presented at trial and the evidence presented at the writ hearing does not preclude a finding of ineffective assistance of counsel. *See, e.g.*,

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[8] It should also be noted that the jury instructions were submitted to the jury at 10:15 a.m., on February 26, 2009, and that the jury was unable to reach a verdict until 11:33, the next day.

Richards v. Quarterman, 566 F.3d 553, 568 (5th Cir. 2009) ("The fact that there is 'some overlap' among the excluded testimony and what came out trial will not necessarily preclude relief"); *Harrison v. Quarterman*, 496 F.3d 419, 426 (5th Cir. 2007) (finding ineffective assistance of counsel where defense counsel failed to produce testimony of an eyewitness to an alleged crime, although there was "some overlap between" the testimony not presented and that presented at trial). Newly discovered evidence that could have been testified to at trial is not cumulative where it would have added a great deal of substance and credibility to the defendant's defense. *Stewart v. Wolfenbarger*, 468 F.3d 338, 359 (6th Cir. 2006)). Nothing presented at trial approached the reality of Davila's abusive childhood, which would have been testified to in harrowing detail by witnesses still disturbed by Sheila's cruelty and neglect.

Had trial counsel complied with the relevant professional norms, as established by the ABA guidelines for capital defense, they would have obtained the services of a mitigation specialist, and they would not have stopped their investigation without contacting all of the people who could shed light on Davila's background and upbringing. By failing to abide by the prevailing professional norms, trial counsel cost Davila the opportunity to have evidence of his extremely abusive upbringing put before the jury, and this failure cost Davila his constitutional right to effective representation at the punishment phase of his trial.

IV. The state court's adjudication of this claim was based on an unreasonable determination of the facts in light of the evidence presented at the state court hearing.

The trial court adopted the state's proposed findings of fact and conclusions of law verbatim, with the exception of two sentences. By doing so, the trial court based its decision on grounds that were at odds with the facts established at the state level. *See* Writ CR at 299-352.[9] The Court of Criminal Appeals simply adopted the trial courts findings and conclusions related to this issue without further discussion. *Ex Parte Davila*, WR-75,356-01, 2013 WL 1655549 (Tex. Crim. App. Apr. 17, 2013). The following state court findings of fact are factually unreasonable:

91, 94, 95: "The 'new' evidence brought forth by the applicant in connection with his writ application would have only served to augment the evidence and themes advanced by Ford and Keene during trial, but nothing the Applicant now presents in connection with his writ provides substantially unique and impactful evidence."

"In short, Dr. Fallis' testimony, as well as the testimony of the other witnesses Applicant's trial attorneys called during the underlying punishment trial, showed the

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[9] The trial court's findings of facts and conclusions of law did not include proposed factual finding 75 or proposed legal conclusion 10; other than those two sentences, the entirety of the state's proposed findings of fact and conclusions of law was adopted by the trial court. *See* Writ CR at 308, 311,338, 342.

Applicant's trial team had prepared an in-depth mitigation investigation."

"Applicants trial attorneys presented substantially the same evidence now brought forth by the applicant, although the applicant's trial attorneys had a narrow group of credible, willing witnesses to present to the jury."

RESPONSE: These three findings of facts, discounting the profuse and detailed evidence of severe physical and psychological abuse uncovered by Toni Knox, could not be more incorrect. The trial team completely failed to uncover, or present to the jury, any evidence of physical abuse, any evidence that Erick and Emily were forced to stand in the corner for hours, were locked in the closet for hours, or the fact that Erick and his sister were forced to wait on their mother hand and foot. There was no mention at the trial that Sheila told Emily that she could have killed Emily and Erick a long time ago. Nor was it mentioned that Erick and Emily were treated as outcasts once their mother took up relationships with their stepfather, Santos.

90: "Ford and Keene presented a holistic, comprehensive, and thorough mitigation case on the Applicant's behalf. It covered the totality of the Applicant's life and brought forth meaningful themes designed to persuade the jury to vote in the Applicant's favor on thc mitigation special issue."

RESPONSE: For the reasons state [sic] above, the presentation of defense counsel cannot be described as holistic, comprehensive, or thorough, as defense counsel completely failed to identify and

present to the jury the fact that Davila suffered severe abuse at the hands of his mother.

26, 27: "In preparing for trial, Keene spoke with Lisa Wallace (the mother-in-law of Emily Davila). Wallace provided the defense team with information useful for the Applicant's mitigation case, but Wallace also told the Applicant's trial attorneys she did not want to testify at trial. (2 WRR 115, 116-17; Keene affidavit, p. 3); Keene made the strategic decision not to call Wallace to testify on the Applicant's behalf because Keene believed the risks attendant to calling a reluctant defense witness outweighed any potential benefit Wallace's testimony would provide to the Applicant's mitigation case. (2 WRR 117)."

RESPONSE: In her sworn affidavit, Wallace stated she would have been willing to testify at trial had she been asked to do so by the defense team. *Id.* Writ CR at 174. The trial court failed to take this statement into consideration.

30. "The Court gives no credence to the hearsay attributed to Rosa Nash Jones that is presented in the affidavit of Toni Knox. Jones' alleged second-hand statements are unsworn, unverified, and unrecorded."

RESPONSE: The comments of Rosa Jones Nash were sworn to by investigator James Hughs, under the penalty of perjury. Writ CR at 174.

33. "Much of the information Knox obtained during her interview with Linda Mireles was already known to the Applicant's trial team and presented to the jury through testimony provided by different trial witnesses. (2 WRR 77-78)."

RESPONSE: Linda Mireles would have added new significant evidence to the mitigation case, including the fact that Emily and Erick were constantly told by their mother that she hated them, that there were tear streaks on the walls from where the children were forced to stand in the corner for hours at a time. Writ CR at 163-66. She would have testified that she lived with Erick while he worked for her husband, that he was a good worker but that Sheila forced him to give her every paycheck on payday. *Id.* at 163. Sheila, who did not work, would yell at Erick for trying to keep any money that he earned, leaving him with "almost nothing to live on." *Id.* Erick sometimes tried to keep more than one job, but this was mainly to give his mother more money, as he "desperately wanted love from Sheila and was always trying to please her." *Id.* at 163-64. She would have added that Erick was first taken in by gang members when he was kicked out of the house. *Id.* at 164. The fact that Erick was kicked out of the house and living on the streets when he first came into contact with the gang members explains how he ended up throwing his life away in the name of his gang. Further, Linda Mireles was never contacted by the defense team. *Id.*

34: "Much of the information Knox obtained during her interview with Elizabeth Olivas was already known to the Applicant's trial team and presented to the jury through testimony provided by different trial witnesses. (2 WRR 82)."

RESPONSE: Elizabeth Olivas would have testified that "If Erick or Emily ever complained about the abusive environment, Sheila would

harshly punish them with physical violence." *Id.* at 168. She also explained that Sheila was a very violent person. *Id.* There was literally no evidence of physical abuse presented at Davila's punishment phase.

52, 55: "The Applicant's trial attorneys hired Dr. Emily Fallis to evaluate and question certain defense witnesses tendered to her by the trial attorneys. (24 RR 156, 179c80 [sic]; 2 WRR 96, 140-41); Dr. Fallis did not serve as the 'mitigation investigator' for the Applicant's trial team. (2 WRR 97; Keene affidavit, p. 1)."

RESPONSE: This idea is in conflict with the following statement found in Dr. Goodness' report, mentioned in Knox's report to Richards: "No records were supplied to this examiner. I was advised that Dr. Fallis would be conducting the larger mitigation investigation, including collateral interviews, and documenting his social history." Writ CR at 26.

86, 92, 93: "Knox believes the lead attorney in a capital murder defense team should delegate the responsibility for leading the mitigation investigation to a qualified mitigation specialist. (2 WRR 23); It is the prevailing practice of criminal defense attorneys in Tarrant County, Texas, to lead and conduct their own mitigation evidence investigations in death penalty cases rather than delegate that duty to someone else, especially a non-lawyer.

The prevailing professional standards in Tarrant County for capital murder cases require that criminal defense attorneys not delegate the conduct of all witness interviews to a non-attorney mitigation specialist

because it is the attorneys themselves who have ultimate responsibility for the accused's defense."

RESPONSE: These series of factual findings are rather troubling, not only because they fly in the face of the ABA guidelines, which require a mitigation specialist, but also because the trial judge herself (the same judge who signed the findings of facts) stated, during a discussion with counsel, that "the law requires them to hire a mitigation expert. The law requires them to hire some – you know, requires a mitigation expert, encourages psychiatric testimony, and – and for them to at least have those test done." 7 RR at 257. It appears the trial judge believed that in *addition* to psychiatric testimony, a mitigation expert was required by law.

V. The state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law.

The following conclusions of law involve unreasonable applications of, or are contrary to, clearly established federal law:

7: "The United States Supreme Court has previously held that where trial counsel's investigation consisted of interviewing all witnesses brought to his attention, discovering little that was helpful and much that was harmful, counsel's 'limited' mitigation investigation was reasonable under *Strickland. Burger v. Kemp*, 483 U.S. 776, 794 (1987)."

RESPONSE: Applying *Burger v. Kemp* was an unreasonable application of clearly established federal law because although the court identified the governing legal rule, it applied that rule unreasonably to the facts of Davila's case. First, all the evidence uncovered by habeas counsel in *Kemp* contained damaging facts, and, according to the Supreme Court, "the papers are by no means uniformly helpful to petitioner because they suggest violent tendencies that are at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of Stevens' strong influence upon his will." *Burger v. Kemp*, 483 U.S. 776, 793 (1987). Unlike the evidence in *Kemp*, the evidence uncovered by Toni Knox would not have led to the introduction of damaging facts, and the fact that Davila was severely abused as a child could do nothing but mitigate his role in the offense and tended to explain how Davila ended up the way he did. Further, in *Kemp,* "[t]he record at the habeas corpus hearing does suggest that [defense attorney] Leaphart could well have made a more thorough investigation than he did." *Id.* at 794. Of course, the evidence presented by Davila showed that his trial counsel could have made a much more thorough investigation. Also, unlike the attorney in *Kemp*, it does not appear that Davila's attorneys interviewed "all potential witnesses who had been called to his attention." *Id.* at 795.

8. "When an applicant claims his trial counsel provided ineffective assistance by performing an inadequate investigation into mitigation evidence, the applicant must demonstrate that the evidence he claims his trial counsel should have uncovered and presented to the jury was evidence that was *reasonably available* before trial. *Martinez*, 195 S.W.3d at 729."

RESPONSE: This conclusion of law is contrary to clearly established federal law because the state court applied a rule that contradicts the governing law set forth in Supreme Court cases. Where a petitioner shows that his trial counsel failed to uncover and present voluminous mitigation evidence, the proper inquiry is whether counsel "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (internal citation omitted). The question is not whether the witnesses who trial counsel failed to identify would have been willing to testify, but rather, "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Davila's] background *was itself reasonable.*" *Id.* at 523. (*See also* Conclusion of Law 24 which relies on the same flawed legal reasoning).

12: "The Applicant has brought forth no *significant* new evidence regarding the mitigation special issue. *Contrast Sears v. Upton*, 130 S. Ct 3259 (2010) (habeas litigation revealed *significant* new mitigation evidence); *Williams*, 529 U.S. at 395 (applicant "uncovered extensive records" relating to mitigation that would have also been available to trial counsel). The "new" evidence brought forth by Applicant is neither significant relative to the evidence reviewed in *Sears* nor

"extensive" relative to the evidence reviewed in *Williams*. Thus, Applicant cannot establish deficient performance under *Strickland's* first prong."

RESPONSE: In relying on *Williams*, the state court confronted a set of facts materially indistinguishable from those in Davila's case and nonetheless arrived at a result different from the Supreme Court precedent. In *Williams*, like in Davila's case, trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Williams v. Taylor*, 529 U.S. 362, 395 (2000). Similarly, Davila's counsel failed to uncover facts showing that he also lived through a nightmarish childhood, forced to serve his mother's every need, and being beaten when he failed to live up to her expectations. Further, as in Davila's case, the state courts "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence

in aggravation." *Id.* at 397-398. The state court should have granted Davila's writ for the same reason the Supreme Court reversed the appellate court's failure to do so in *Williams.*

Sears is inapplicable to the deficient performance prong because that case clearly revolved around the state court's failure "to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim." *Sears v. Upton*, 561 U.S. 945 (2010).

13,14: "This Court agrees with Keene's assessment of the new evidence brought forth by the Applicant in connection with his claim of ineffective assistance of counsel: None of the 'new' evidence offered by the applicant through Toni Knox would have changed how the jury voted on the special issues in this case because the substance of Applicant's "new" evidence had already been put forth by Ford and Keene in other formats or via different witnesses. *See Martinez*, 195 S.W.3d at 727-28 (Jury heard same evidence at trial, albeit through different witnesses, of defendant's horrible childhood). Thus, Applicant cannot establish prejudice required under *Strickland's* second prong.

This Court specifically concludes the evidence attributed by Knox to Rosa Nash, Sandra Vargas, Linda Jones Mireles, and Elizabeth Olivas would not have made a quantitative difference to the jurors in this case given the similarity of other evidence already presented at trial. *Cf. Martinez*, 195 S.W.3d at 727-28."

RESPONSE: These conclusions of law are of course premised on the incorrect factual finding that no new evidence was presented in this case. Further, the state courts "prejudice determination

was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-398. Instead, the state court focused in inquiry solely on whether or not it considered the additional evidence identified by Toni Knox to be "new." Finally, the state court failed to recognize that the proper inquiry in this case is whether there is a reasonable probability that "at least one juror would have struck a different balance" had they been presented with a complete view of Erick Davila's childhood. *Wiggins*, 539 U.S. at 537.

20. "Ford and Keene's decision to direct, lead, and conduct the mitigation investigation was reasonable and consistent with the prevailing professional norms among the criminal defense bar of Tarrant County, Texas, during the relevant time period."

RESPONSE: "The Supreme Court has described 'the standards for capital defense work articulated by the American Bar Association (ABA)' as 'standards to which we long have referred as guides to determining what is reasonable.'" *Mason v. Mitchell*, 543 F.3d 766, 774 (6th Cir. 2008) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). By limiting the prevailing professional norms to those found in Tarrant County, Texas, the state court contradicted the governing law set forth by the Supreme Court of the United States. Further, the fact that an entire county fails to follow the standards for capital defense as identified by the Supreme Court should not excuse trial counsel's failure to

follow those established norms. (*See also* Conclusion of Law 21, 22, and 23, which also do not follow the norms established by ABA, discussed above).

IV. CONCLUSION

Davila's trial attorneys' deficient mitigation performance cost him the ability to present evidence of severe abuse to the jury. Had Davila's full story been presented to the jury, there is a reasonable probability that at least one juror would have voted for life, meaning that Davila was prejudiced by his trial counsels' deficient performance. By adopting the state's proposed findings of facts and conclusions of law, the state habeas court rendered a ruling that was based on an unreasonable determination of the facts, and was based on an unreasonable application of clearly established federal law. For these reasons, this Court should find that Erick Davila's trial counsel rendered ineffective assistance of counsel during the punishment phase of his trial, reverse his death sentence, and order the State of Texas grant him a punishment phase where he is assisted by constitutionally effective counsel.

CLAIM THREE: Davila Was Denied Effective Assistance of Counsel During His Direct Appeal in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution By Appellate Counsel's Failure to Recognize, and Raise The Claim, That He Was Convicted by An Improper Statement of Law in the Jury Instructions

I. Direct appeal counsel was ineffective for failing to raise a claim related to the incorrect transferred intent instruction.

A. Baseline Legal Principles

Davila contends that appellate counsel owes him a duty of competent representation. This is particularly true in a capital case, because "there is a significant difference between the death penalty and the lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). The constitutional standard for judging the effectiveness of counsel under the Sixth Amendment is a two-prong test, requiring that the petitioner show: (i) counsel's performance was so "deficient," that counsel did not provide "reasonably effective assistance," and (ii) that counsel's errors prejudiced the defense by depriving the defendant of a fair trial whose result is reliable. An attorney is ineffective if he or she "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The right to effective assistance of counsel at the appellate level is rooted in the Sixth Amendment right to effective

assistance of counsel. *Evitts v. Lucey*, 105 S.Ct. 830, 835 (1985).

B. Initial Jury Instruction as to Capital Murder

As explained in the fact section, the State of Texas never requested a transferred intent instruction, which is specifically allowed by Tex. Penal Code § 6.04. 19 RR 137-159. The jury was given the following instruction as to capital murder:

> Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

CR at 1924.

Not to belabor the point, but 'transferred intent' was not included because it was not requested. It necessarily follows that the charge as given did not permit the jury to convict Davila of capital murder unless he had the specific intent to harm both Queshawn ***and***

Annette Stevenson. This charge was given to the jury at the beginning of the day on February 19, 2009.

C. Flawed Supplemental Instruction in Response to Jury's Note

In the middle of the afternoon, after the parties had closed and the jury had been deliberating for four hours, the jury sent the following note to the judge:

> In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others

Id. at 1931.

The note clearly suggested that the jury believed Davila had intended to kill one person, and did not know if this level of intent was sufficient for a capital murder when the allegation was that two people were killed.

The judge responded with an incorrect instruction, which did not clarify that Davila must intend to kill two distinct people before he could be convicted of a capital murder. To wit:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, armed [sic], or otherwise affected.

CR at 1933. Davila made a contemporaneous objection to this charge, but the objection was overruled. 20 RR 53.

After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934.

D. Unalloyed Legal Error

The additional charge given contained an incorrect statement of the law because it failed to recognize that in Texas one must have the specific intent to murder *at least two people to be guilty of capital murder*; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

The charge given, however, misled the jury by instructing them that, contrary to law, they could find Davila guilty if he had the intent to kill one person, as long as two people ultimately died.

E. Piquant Harm

"In giving additional instructions to a jury – particularly in response to inquiries from the jury – the court should be especially careful not to give an unbalanced charge." *United States v. Acosta*, 763 F.2d 671, 679 (5th Cir. 1985) (quoting *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970)).

The unbalance is so striking in the supplemental instruction given in Davila's case that it reduces to as little as one word: "person." The supplemental instruction reads "a different person was injured, armed [sic], or otherwise affected."

By contrast, the initial jury instructions repeatedly used the conjunctive words "and" and "both murders" to describe the deaths of Annette and Queshawn.

"The last word is so often the decisive word." *United States v. Arboleda*, 20 F.3d 58, 61-62 (2d Cir.1994).

II. Had this issue been raised on direct appeal, the issue would have been meritorious

There can be no doubt that this issue should have been raised on appeal, and had it been raised, Davila's conviction would have been reversed. In Texas, "[t]he manner in which appellate courts analyze jury charge error is prescribed in article 36.19 of the Code of Criminal Procedure." *Heins v. State*, 157 S.W.3d 457, 460 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (citing *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App.1986) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). A reviewing court first determines whether error exists in the charge, and then must determine whether any error caused harm sufficient to require reversal. *Id.* As explained above, error existed in the charge because it permitted the jury to convict Davila even if the jurors believed that he intended only to kill Jerry Stevenson.

The Court of Criminal Appeals concisely explained charge error harm analysis for Texas in *Murphy v. State:*

> A defendant is entitled to be convicted upon a correct statement of the law. When the trial court fails to correctly charge the jury on the applicable law, "the integrity of the verdict is called into doubt." Cases involving preserved charging error will be affirmed only if no harm has occurred. "Some harm" under the *Almanza* analysis means any harm. Presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require reversal of a defendant's conviction.

44 S.W.3d 656, 665-66 (Tex. App. – Austin 2001, no pet.). Clearly, an erroneous jury charge that precludes a defendant's sole defense – in this case, that Davila lacked the necessary intent to be guilty of capital murder – harms a defendant. As *any harm at all* from this charging error would have required reversal, Davila's case would likely have been reversed had this issue been raised on appeal.

However, even if the objection lodged by the defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted had the issue been raised on appeal. In Texas, failure to properly preserve jury charge error does not preclude review, but changes the degree of harm necessary for reversal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). If the charging error was not preserved at the trial court level, a greater degree of

harm, egregious error, is required. *Id.* However, the egregious harm standard is met in cases like Davila's, where the jury charge error goes "to the basis of the case and vitally affecting appellant's defensive theory." *Heins v. State*, 157 S.W.3d 457, 461 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (citing *Almanza*, 686 S.W.2d at 172). The jury's note and the timing of its verdict show that its decision clearly hinged on the requisite intent. The harm of this egregious charging error – going directly to the sole defensive issue – was magnified by the fact that the jury immediately relied upon it to find Davila guilty.

III. Failing to raise a single meritorious appellate issue constitutes ineffective assistance of counsel.

The Supreme Court has consistently held that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (*citing United States v. Cronic*, 466 U.S. 648, 657, n. 20 (1984); *Strickland v. Washington*, 466 U.S., at 693-696).

The State of Texas has likewise recognized that the failure of direct appeal counsel to raise a single meritorious claim constitutes ineffective assistance of counsel. In *Ex parte Miller*, the Court of Criminal Appeals explained that "[t]o show that appellate counsel was constitutionally ineffective for failing to assert a

particular point of error on appeal, an applicant must prove that (1) counsel's decision not to raise a particular point of error was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal." *Ex parte Miller*, 330 S.W.3d 610, 623 (Tex. Crim. App. 2009) (citing *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000)). While recognizing that an attorney "need not advance every argument," the Court of Criminal Appeals explained that "if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it." *Id.* at 623-24. Stated another way, there can be no plausible strategy for an appellate attorney's failure to raise "a 'lead pipe cinch' point of error" on direct appeal. *Id.* at 624-25; *see also United States v. Reinhart*, 357 F.3d 521, 525 (5th Cir. 2004) ("Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention."); *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012), reh'g denied (Jan. 16, 2013) ("[I]f 'appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it.'"); *Ex parte Daigle*, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) (granting a reversal where appellate counsel failed to raise a single appellate issue when "reasonable appellate counsel would have raised this issue on appeal, and there was a reasonable probability that a different outcome would have resulted.").

Because there is a reasonable probability that Davila's conviction would have been overturned had the jury charge issue been raised on appeal, appellate counsel was ineffective for failing to raise a claim related to the improper jury charge.

IV. Contemporaneously Filed Motion to Stay and Abey

Davila recognizes that this claim was not presented to the state courts; thus, he is filing a motion related to his requested Stay and Abeyance along with the filing of this Amended Writ. Davila will only briefly introduce the issue here and respectfully direct this Court to his motion for a full explanation of his argument.

Federal precedent has firmly established that federal district courts should not entertain unexhausted claims raised in writs of habeas corpus. *See Rose v. Lundy*, 455 U.S. 509 (1982). This idea is based on the "interests of comity and federalism [which] dictate that state courts must have the first opportunity to decide a petitioner's claims." *Rhines v. Webber*, 544 U.S. 269, 273 (2005). However, this doctrine was established in the era before AEDPA was enacted when there was no statute of limitations for the filing of federal habeas petitions. *Id.* at 274. With the enactment of AEDPA came the strict one-year statute of limitations on the filing of federal petitions. 28 U.S.C. § 2244(d).

In *Rhines*, the Supreme Court recognized the difficulty faced by petitioners when trying to balance the

effect of the exhaustion requirement on one hand with the short statute of limitations on the other. After discussing the goals of AEDPA and the role of habeas corpus in general, the Court decided that it is proper for district courts to stay and abey federal writs so that unexhausted claims can be presented to the state courts in limited circumstances. *Rhines*, 544 U.S. at 277. The Court decided that it was proper to stay and abey a petitioner's claims when: (1) "the district court determines there [is] good cause for the petitioner's failure to exhaust his claims first in state court," (2) the unexhausted claims are potentially meritorious, and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 277-78 (2005).

The Supreme Court has identified at least three objective impediments to compliance with a procedural rule: (1) interference by officials that makes compliance impractical, (2) a showing that the factual or legal basis for the claim was not reasonably available, and (3) the procedural default was the result of ineffective assistance of counsel, viz., failing to properly preserve a federal constitutional claim for review in state court. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986).

The Supreme Court held many years ago that ineffective assistance of counsel is cause for a procedural default. *Id.* at 488; *see also Collins v. Waller*, 121 F. App'x 50, 51 (5th Cir. 2005) (not designated for publication) ("Ineffective assistance of counsel can constitute cause for a procedural default."). As Davila's state appellate counsel was ineffective for failing to identify

and raise this issue on appeal, Davila has established cause for his failure to raise this issue below. This Court should grant his pending motion to stay and abet [sic] so that the state courts have an opportunity to address this issue.

V. The Supreme Court's recent opinion in *Trevino v. Thaler* applies straightforwardly to the case *sub judice*

Recently, in *Trevino v. Thaler*, the Supreme Court held that the holding of *Martinez* applies to Texas:

> [A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (quoting *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)).

Davila submits that his state habeas counsel was ineffective for failing to present this claim in his state writ of habeas corpus. State writ counsel's deficient performance will be discussed below, in Claim of Error Four.

CLAIM FOUR: State Habeas Counsel Rendered Ineffective Assistance Counsel

I. Introduction and Core Legal Principles

Recently, in *Trevino v. Thaler*, the Supreme Court held that the holding of *Martinez v. Ryan* applies to Texas:

> [A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Trevino v. Thaler, 133 S. Ct. 1911, 1921 (U.S. 2013) (citing *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)). To show his ineffectiveness claims are substantial, a petitioner "must demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S.Ct. at 1318.

Once again, there are two elements to an ineffectiveness claim: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (2003).

Davila submits that his state habeas counsel, David Richards, was ineffective for failing to subpoena any of the witnesses (other than Toni Knox) to testify

at the state writ hearing. 2 Writ RR 3. He was further ineffective for failing to gain anything more than a passing familiarity with the facts, hoping instead to "wing it" by parroting Ms. Knox's report. 2 Writ RR 148-50. Indeed, Richards managed to put all of one sentence about Ms. Knox's report in the state writ (which was the sum total of argumentation regarding the actual facts of Davila's case). Writ CR at 16. While Davila is grateful for the report submitted by Toni Knox in his case, which identified evidence from multiple sources of his horrendous childhood that was never uncovered by his trial counsel, he believes Richards was ineffective in presenting this evidence to the state habeas court.

To add to his ineffectiveness, rather than raising the ineffective appellate counsel claim, *see* Claim Three, Richards included two claims that were "not cognizable on habeas review." *See Ex Parte Davila*, WR-75,356-01, 2013 WL 1655549 (Tex. Crim. App. 2013). It is simply amazing that Richards completely failed to identify the fact that appellate counsel had overlooked the strongest appellate issue in Davila's case. *See* Claim Three.

II. Richards' performance was unreasonable based on the prevailing norms for capital habeas counsel.

A. Professional Standards

The State Bar of Texas, in its published Guidelines for Texas Capital Counsel, includes the "Duties of

Habeas Corpus Counsel."[10] The Guidelines identified one duty as follows:

> Habeas corpus counsel cannot rely on the previously compiled record, but must conduct a thorough and independent investigation. Specifically, habeas counsel cannot rely on the work of, or representations made by, prior counsel to limit the scope of the post-conviction investigation. Counsel must not assume that the trial record presents either a complete or accurate picture of the facts and issues in the case.

Id. at 30. Further, the State Bar's Guidelines declared that state habeas counsel has a "duty to conduct a searching inquiry to assess whether any constitutional violations may have taken place." *Id.*

The American Bar Association agrees. According to the ABA Guidelines for capital defense,[11] "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7(A); http://ambar.org/2003Guidelines at 968. The ABA Guidelines emphasize this point: "Counsel at every stage have an obligation to conduct a full examination of the defense

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[10] *Guidelines and Standards for Texas Capital Counsel*, State Bar of Texas, at 30; adopted April 21, 2006; available at: http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/TexasCapitalGuidelines.pdf

[11] *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, American Bar Association, revised February 2003.

provided to the client at all prior phases of the case." *Id.*, Guideline 10.7(B). And of particular significance to Davila's case: "As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues." *Id.* at 1086, Commentary to Guideline 10.15.

Finally, the ABA Guidelines require that counsel "evaluate each potential claim in light of . . . the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." *Id.* at 1028, Guideline 10.8 ("The Duty to Assert Legal Claims"). The reasoning behind this last mandate is made abundantly clear: "One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." *Id.* at 1030, Commentary to Guideline 10.8.

Unfortunately for Davila, his state writ attorney did not abide by these professional norms.

B. State habeas counsel's performance as to the *Wiggins* claim.

Erick's state writ started with a whimper, as the state habeas counsel, David Richards, allowed the

deadline for filing the writ to pass without filing a writ or requesting an extension. Writ CR at 358-60. Luckily, the Court of Criminal Appeals allowed Richards an additional 180 days from March 2, 2011, to file the writ. Writ CR at 361-62. Richards used all of his additional time to draft his 18-page state writ, which was filed on August 29, 2011. Writ CR at 2-20. The first six pages of that writ consisted of title pages, identity of the parties, a table of contents and authorities, and the grounds presented. Writ CR at 2-7. The next three pages consisted of a brief factual recitation. A whopping five pages were devoted to the *Wiggins* claim, which merely referenced the attached mitigation report compiled by Toni Knox. Writ CR at 11-16. The final two claims were presented in a single paragraph that extended over two pages. Writ CR at 17-19.

Quite simply, the scant, untimely writ submitted by state writ counsel Richards is proof in itself of his failure to abide by the professional norms established for habeas counsel in capital cases. Had writ counsel not attached the thorough mitigation report compiled by Toni Knox, which luckily was sworn to and included sworn affidavits from multiple valuable mitigation witnesses the trial team never contacted, then it is entirely possible the state writ would not have preserved any issues for federal review. A review of the state writ shows that Richard's did little more than file a boilerplate writ, to which he attached the report compiled by his able mitigation specialist.

C. The state writ hearing, a squandered opportunity.

State writ counsel's performance at the state writ hearing was also deficient. First, it should be noted that writ counsel failed to call any of the witnesses identified by Toni Knox. Had these witnesses been called, the state district judge would have heard live testimony establishing that Davila suffered tremendously during his childhood, and that the evidence of his suffering was never discovered by his trial team. 2 WRR 1-153; Writ CR at 146-174 (A review of Knox's report and the record of the writ hearing shows that none of the witnesses she discovered were called to the hearing). Second, he failed to call members of the defense team to establish which person played which role in Davila's defense. For example, he did not bother to call Dr. Goodness, whose report made it clear that she was told "Dr. Fallis would be conducting the larger mitigation investigation, including collateral interviews, and documenting his social history." Writ CR at 26. This of course is in conflict with trial defense attorney Keene's testimony that it was the defense attorney's themselves who investigated the mitigation case. 2 WRR at 96101.

The effects of not calling the witnesses to the hearing was no doubt compounded by the fact the State Writ hearing judge did not have a copy of the appendixes to Toni Knox report prior to the hearing date. *Id.* at 7-8.

A review of the writ hearing testimony shows that Davila's counsel hardly asked any substantive questions of his sole witness, Toni Knox. *Id.* at 11-40. Indeed, rather than have Toni Knox explain to the court, in person, exactly what new evidence was uncovered, he simply asked her if "those affidavits were attached as appendices to your report." *Id.* at 27.

By failing to call the newly discovered witnesses to the writ hearing, state writ counsel passed up the best opportunity to persuasively get the missing information before the state trial court, the Texas Court of Criminal Appeals, and this Court.

D. Writ Counsel failed to identify and raise a claim related [sic] the improper jury instructions.

In Claim Three, Davila explained that his direct appeal counsel was ineffective for failing to identify and raise an issue related to the improper transferred intent instruction given during trial. He incorporates that argument here. Although appellate counsel's failure to raise this claim is sufficient cause to excuse a procedural default, *Murray v. Carrier*, 477 U.S. 478, 488, (1986); *see also Collins v. Waller*, 121 F. App'x 50, 51 (5th Cir. 2005) (not designated for publication) ("Ineffective assistance of counsel can constitute cause for a procedural default"), Davila believes the issue can also be identified under the *Trevino* line of cases. Of course, had this issue been raised by state writ counsel,

Davila would have been granted a new appeal to challenge the improper instruction given in his case. *Ex parte Miller*, 330 S.W.3d 610, 626 (Tex. Crim. App. 2009).

E. Writ counsel's failure to investigate Davila's drug use.

According to an expert hired by the trial defense team, Dr. Goodness, Erick Davila was diagnosed with severe Polysubstance Abuse. *See* Writ CR at 87. This no doubt explains the fact, discovered by Toni Knox, that Davila began smoking marijuana at an early age, and by the age of 20 Davila "was using Ecstasy and Methamphetamines heavily." *Id.* at 88. Erick was taking ecstasy as many as five to six times a day by the time of the shooting. *Id.* Indeed, Garfield Thomas, Davila's codefendant, gave a recorded interview with the local news in which he confirmed that Davila was on drugs at the time of the shooting. A copy of this interview is currently in the possession of the Tarrant County District Attorney's Office, and Davila has requested a copy and will supplement the record with a copy once he receives it.

However, because of habeas counsel's complete failure to gain a familiarity with his own investigator's report, or with the underlying facts of this case, no one has ever considered how Davila's drug use might have affected his perceptions on the night of the shooting (including how it diminished his well-documented extremely poor ability to see at far distances), or how the

drug use might have fit into the overall mitigation scheme.

F. Possible reasons for writ counsel's deficient performance.

Toni Knox has prepared an affidavit related to her experience working with Attorney David Richards during the state proceedings. *See* Exhibit "B" attached. In that affidavit she explains that "Mr. Richards' health was not good as I believe he had been in a car accident and had suffered a stroke or several strokes before the writ hearing. I know at one point he had to move his office because he was unable to manage the stairs and was using a cane." *Id.* at 3. In Ms. Knox opinion, "Mr. Richards' physical impairment affected his ability to prepare tor this hearing, or to understand the underlying facts to be presented."

Knox also explains the preparation for the writ hearing:

> David Richards did not contact me about this hearing until sometime late in June 2012 and I was concerned about my testimony. We scheduled a phone call to discuss my testimony on June 24th, which was a Sunday. When Mr. Richards and I started talking he did not have a copy of my affidavit, so the phone call was not very meaningful. He started looking through his papers and realized that his assistant and had not given him a copy. I told him that I would email him a copy and I believe I did but this meant he only

> had the time to read over the affidavit and then call me back. We really did not discuss the hearing or my affidavit in any detail. I was very anxious as I did not feel I or Mr. Richards was prepared for the hearing. It felt as though we were just "going through the motion" of showing up for the hearing. I had no expectations that anything positive would come from the hearing.
>
> I met with Mr. Richards about this report exactly one (1) time before the hearing. We met on July 2, 2012 prior to the hearing Mr. Richards and I only met for about an hour. We met in the courtroom in the attorney's conference type room and we spent very little time discussing my testimony. The Tarrant County DA came in and wanted copies of my interviews and other information. I spent time trying to get that information to them and David sent his assistant to get him some lunch. Since the DA was present in the conference room trying to get my records, we really did not have much time to discuss the hearing.

Id. at 2.

Knox went on to explain that "[b]oth before and after this meeting, Mr. Richards was generally unfamiliar with the contents of my report," and to her knowledge, "Mr. Richards made no effort to bring any of the people identified in the report as potential witnesses to testify at the writ hearing." *Id.*

G. State writ counsel's failed [sic] to render constitutionally effective representation.

When one views David Richards' representation of Davila through the lens of the guidelines established by the Texas State Bar and the American Bar Association, it is painfully obvious that Davila's state writ counsel was ineffective. Luckily, he did take a step in the right direction by hiring a mitigation specialist, and by attaching the specialist's report to the writ he prepared. However, that seems to be the extent of work. As state writ counsel failed to provide effective representation for his client, establish [sic] has shown cause for a default related to the claims found in his *Wiggins* claim, his ineffective assistance of appellate counsel claim, and his *Brady* claim.

III. Davila's underlying ineffectiveness claims have merit.

First, it should be stated that Davila believes that the information provided by Toni Knox in the form of affidavits from family members was sufficiently presented to the state habeas court so that the information should have been taken into account. However, to the extent that the state court refused to give weight to those affidavits, prejudice is demonstrated by showing, *supra*, that the state district court rejected Davila's IAC claims because the family members quoted in Knox's report were not asked to give live testimony. By failing to present the live testimony of the persons identified by Knox, Richards failed to show the

trial court the depth of mitigating evidence that the trial team failed to discover. To the extent Richards' deficient performance prevents this Court from considering the powerful mitigation evidence uncovered by Toni Knox, Richards' deficient performance should [sic] been seen as cause for Davila's failure to present live testimony below, and this Court should be able to take the powerful mitigation evidence into account.

Further, Richards failed to present to the Texas court Davila's ineffective assistance of appellate counsel claim. As Davila has already explained, had that claim been presented to the state courts, there is a great probability that he would have been granted a new trial.

VI. [sic] How to Proceed?

While the Supreme Court's analysis in *Trevino* clearly grants this Court the authority to review procedurally defaulted claims that were not raised as a result of habeas counsel's ineffectiveness, the Supreme Court did not provide guidance on how this Court should proceed. Davila asserts there are two options: stay the current proceedings and allow Davila to return to the state court, or review these claims de novo. As will be further discussed in the contemporaneously filed Motion to Stay and Abey, Davila believes this court should stay the current proceedings and allow Texas the chance to pass upon these claims.

CLAIM FIVE: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CLAIM SIX: The Trial Court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

Exhaustion: These Claims were raised as points of error three and five in Davila's Direct Appeal to the Court of Criminal Appeals. They were addressed on their merits by that Court. *See Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011).

During the suppression hearing, defense counsel played for the trial court an audio recording of Detective Johnson's interview with April Coffield. 16 RR 195, 204-230. On the recording, Coffield can be heard stating that she never saw the shooter's face on the night in question. 16 RR 231; *see also* Def.'s Ex. 89 at 6 ("I didn't see no face or nothing.").

This conflict between the recorded interview of Coffield (wherein she states she did not see Davila's

face) and Johnson's warrant affidavit (where he states that Coffield did recognize Davila as the shooter) amounts to "a reckless disregard for the truth" that renders Johnson's affidavit inadequate to supply probable cause for Davila's arrest.

I. Fourth Amendment protections and *Franks v. Delaware*

The Fourth Amendment to the United States Constitution, coupled with the Due Process Clause of the Fourteenth Amendment, is the bulwark protecting all American citizens from unreasonable searches and arrests or seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Code of Criminal Procedure delineates the prerequisites necessary to render an affidavit for an arrest warrant, or a complaint under Texas jurisprudence, sufficient. Tex. Code Crim. Proc. art. 15.05. Section 2 of Article 15.05 reads as follows: "It must show that the accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense."

Incumbent in the evaluation of the sufficiency of the complaint is that the information contained within and sworn to by the affiant is credible and truthful. This very issue was addressed by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978). Specifically, the *Franks* Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavits false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56.

Justice Blackmun further explicated *Franks* Court's holding:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." This does not mean "truthful" in the sense that every

> fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Id. at 164-65 (quoting the language of Judge Frankel in *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966) (unreported)).

II. The Trial Court heard Davila's Motion to Suppress on Day Sixteen

Judge Wilson took up Davila's motion to suppress on [sic] sixteenth day of trial, February 12, 2009. 16 RR 204. The first half of the suppression hearing trained on the validity of the warrant; the second half trained on Davila's statements. 16 RR 246 (testimony of Detective Brent Johnson).

Detective Johnson prepared and swore to the probable cause affidavit used to obtain the warrant for Davila's arrest. *Id.* Those paragraphs in Detective Johnson's affidavit regarding the information that April Coffield provided read as follows:

> April Coffield was near the party at 5758 Luther Ct., visiting a cousin. I interviewed Coffield. Coffield saw what she believed to be a green Ford Focus drop a black man off in the 5700 block of Luther Ct. Coffield saw the man

run toward the four bedroom town home at the corner of Anderson. Coffield saw a red dot on the ground while the man was running.

. . .

Coffield stated that she heard shots fired as did Charlene Ogierumwense. *Coffield ran into a house then peeked out.* Coffield saw the man, who got out of the car on Luther Ct., standing in front of the apartment where the children's birthday party was in progress. He was holding a rifle. Coffield then saw the man fire into the apartment. The man fled on foot. Ken Reid [sic] saw the car that dropped off the man speed away from the scene. A man came out of the apartment at 5701 Anderson. The man was "hollering". Coffield recognized that there was trouble. Coffield went into the apartment in an attempt to help. In the apartment Coffield saw people who appeared to have been shot . . .

. . .

Detective F. Serra III 2167 prepared photospreads containing Davila and five other black males of similar physical characteristics. Detective Boetcher and I showed the photospreads to witnesses. Ken Reid [sic] immediately picked Davila as the man he saw carrying the rifle from Luther Ct. Reid [sic] told me that he saw Davila's face under a street light. April Coffield looked at the photospread. She seemed nervous at first. She put her finger on Davila and said she saw him once. Detective Boetcher asked her about

> Davila. Coffield admitted to Detective Boetcher that she has seen Davila at least a dozen times. *Coffield then said that Davila was the man she saw running with a rifle and that Davila was the man she saw shoot into the apartment where Oueshawn* [sic] *and Annette Stevenson were killed.*

24 RR 2-4; State's Ex. 117 (emphasis added).

Johnson further testified at the suppression hearing that this information had been obtained from Ms. Coffield during a recorded interview conducted the day after this offense. A transcription had been made of her interrogation. However, Detective Johnson conceded that Ms. Coffield had emphasized that she had not seen the face of the shooter. 34 RR 6; *see also* State's Ex. 117. Moreover, at no time did she inform him that she had run into a house while the shooting was in progress and then "peeked out," as he detailed in his affidavit. Detective Johnson's testimony in pertinent part is as follows:

> BY MR. FORD [Defense counsel]:
>
> Q. Detective Johnson, so were you able to listen to that recording?
>
> A. Yes.
>
> . . .
>
> Q. So at some point when you made it, you heard what April Coffield was saying to you while you were recording it?
>
> A. Yes.

Q. And you're aware, sir, that she told you she did not see the face of the man doing the shooting? That's a "yes" or "no."

A. She said she didn't see faces, but we clarified it, I believe. I couldn't understand that part of the tape, part of the recording.

. . .

Q. (BY MR. FORD) I'm going to show you page 6 of 9 of what has been admitted into evidence. Your question is: Okay. How – how did you see – would you recognize him again?

Coffield: I didn't see no face or nothing. I just seen. [sic].

So she says there, "I didn't see no face"?

A. Yes.

Q. And sir, you're a detective. You have to see a face in order to recognize somebody, correct?

A. Correct.

Q. And your affidavit, if you turn to your arrest warrant affidavit, you put a line in your arrest warrant affidavit that Coffield said that Davila was the man she saw running with a rifle and that Davila was the man she saw shoot into the apartment.

That's – is that correct?

A. Yes. Can I see the affidavit? Yes, that's – yes, that's correct.

Q. And yet you have a transcript, and she didn't see the shooter's face?

A. But I clarified that. Later, that one small place she said that she hadn't seen no faces or nothing. Very general statement. But I clarified that. I asked her if – I went back and said, "But you told me it was Big Truman."

And let me see, where did it go? And I said, "Did you see Big Truman or not?" "It was not. It was somebody else shooting," da, da, da.

And then when she finally clarified it was not Big Truman . . .

In the – in the transcript we go through a complete description of it where she describes his face, his beard color, his skin color, his hair. She convinced me that she had seen him. I mean, that one small part taken out of context, sure, she said that. But she went back and she described the guy she saw shooting.

Q. She gave a general description in general terms, correct? Weight, height?

A. Skin Color.

Q. Skin color?

A. Beard color.

Q. And she said –

A. Hair style.

Q. And she said he had short braids?

A. Correct.

Q. She didn't say, I recognize his face?

A. She did not use those words, no.

16 RR 230-33.

III. These Inaccuracies Undermine the Warrant

A. False Statement

It is without question that the information that Detective Johnson inserted into his probable cause affidavit regarding Ms. Coffield's alleged identification of Davila as the shooter was false. *See generally United States v. Reinholz*, 245 F.3d 765 (8th Cir. 2001) (where allegation in search warrant affidavit was that "a confidential and reliable source" and defendant were involved in the use of methamphetamine, this was a false statement because it "implied that [the affiant's] source has knowledge of Reinholz's drug activities and that independent police investigation corroborated the informant's declarations" when in fact source was pharmacist whose opinion [sic] based only on defendant's purchase of iodine crystals.).

Coffield had stressed to him that she did not see the shooter's face. She also never mentioned "peeking out" of a house during the shooting. Therefore, Detective Johnson's inclusion that she had identified Davila as the culprit was untrue.

B. Reckless Disregard for Truth of Statements Made by Affiant Johnson

At a minimum, this also proves that Detective Johnson had a reckless disregard for the truth when he drafted his affidavit. *See United States v. A Residence Located at 218 Third Street, New Glarus, Wis.*, 805 F.2d 256 (7th Cir. 1986) (finding that an affiant acted with reckless disregard for the truth where he 'in fact entertained serious doubts as to the truth of' his allegations, adding that "[r]eckless disregard for the truth may also be proved inferentially from circumstances evincing obvious reasons to doubt the veracity of the allegations"); *United States v. Garcia-Zambrano*, 530 F.3d 1249 (10th Cir. 2008) (finding "reckless disregard" when officer's oral report to detective was either inaccurate or misunderstood); *United States v. West*, 520 F.3d 604 (6th Cir. 2008) (finding "reckless disregard" in reporting informant's accusation of defendant's drunken confession to murdering missing person and placing body in certain well, but failing to report that all efforts at corroboration had failed notwithstanding specific detail of story); *United States v. Davis*, 471 F.3d 938 (8th Cir. 2006) (holding that a statement that the firearms were in 'plain view' was made in reckless disregard of the truth where, in actuality, firearms were found by the "opening of a closet padlocked from the outside during a sweep to look for potential accomplices").

To repeat, nowhere in her interview did Coffield specifically identify Davila as the person who committed this offense. If Coffield's spurious identification of

Davila is excised from the affidavit, and the remaining "four corners" are analyzed, there is dangerously little to connect Davila to this crime.

C. Material Omission

Detective Johnson did include information from Kent Reed in which he identified Davila as carrying a rifle, but nowhere in the affidavit did Kent identify Davila as the shooter. 34 RR 4; Def.'s Ex. 89. "The reasoning of *Franks* logically extends to material omissions." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.4(b), at 688 (5th ed. 2012).

IV. Conclusion

By permitting the State to offer the three statements in the guilt/innocence phase of Davila's trial and the fourth statement in the punishment phase, the trial court violated Davila's federal Constitutional rights.

CLAIM SEVEN: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CLAIM EIGHT: The trial court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Exhaustion: These claims were raised as points of error seven and nine in Davila's direct appeal to the Court of Criminal Appeals. They were addressed on their merits by that Court. *See Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011).

The Supreme Court in its landmark decision of *Jackson v. Denno*, 378 U.S. 368 (1964) espoused the now renown proposition that the Government's use of coerced confessions obtained pursuant to custodial interrogation against those persons at their trial violates the fundamental constitutional guarantee of due process of law. The Court explained:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession,

> *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872; *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

Id. at 376-77.

Texas courts have explained that the State's use of both oral and written statements obtained pursuant to custodial interrogation are not admissible against an accused unless the state can demonstrate by a preponderance of the evidence that certain procedural safeguards were taken to protect a defendant's constitutional right against self-incrimination. *See, e.g.*, *Thai Ngoc Nguyen v. State*, 292 S.W. 3d 671, 677 (Tex. Crim. App. 2009); *State v. Gobert*, 275 S.W.3d 888, 892-93 (Tex. Crim. App. 2008). "Custodial interrogation" is legally defined as questioning initiated by law enforcement officers after an accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona*, 384 U.S. 436, 444 (1966).

I. Davila Was Interrogated for Seven Hours

At Davila's trial it was established that he was present in custodial interrogation for seven hours. 14 RR 283-85. During this seven-hour period, Davila did not ask to use the restroom and was not given anything to eat or drink. *Id.* According to Detective Johnson, Davila never asked for anything to eat or drink, however he testified he had offered Davila food or liquids. *Id.* He did not put anything about the offer in his notes. *Id.*

II. Every Factor In the *Schneckloth* Test Militates in Favor of a Finding of Involuntariness

A. A Defective Warrant Vitiates Any Finding of Consent

All four written statements given by Davila were obtained as a result of custodial interrogation. Davila had been formally placed under arrest pursuant to an arrest warrant. If this warrant is found to be defective (see Claims Five and Six, *supra*), then Davila's statements were involuntary *vel non*. "A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid." *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

B. No Reasonable Jurist Could Reach the CCA's Conclusion As To Coercion and the Lack of Valid Consent Because of Davila's Physical Condition (Hunger and in Need of Using Restroom)

"While it is unlikely that a single coercive element will, standing alone, be enough to invalidate a consent, several of them in combination will. Moreover, in a case otherwise close on the question of consent, the presence of a single coercive element may well be enough to tip the scales." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §8.2(b), p. 81 (5th ed. 2012).

Davila was subjected to interrogation for approximately seven hours without receiving any food or water, and without going to the restroom. "There is general agreement that custody makes the prosecution's burden particularly heavy." *Id.* at 85. Davila contends that this is all the more so when a man is made to sit an entire day without food or drink or using the restroom.

C. Impairment of the Excretory Function is Functionally Identical to Denial of Medical Care

First, the interrogation lasted seven hours. *See State v. Vinick*, 398 N.W.2d 788 791 (Iowa 1987) (defendant's confession was involuntary when given in response to police questioning and defendant "was not alert and capable of giving meaningful answers to

questions during the ***six hours*** . . . " (emphasis added)).

Second, using the restroom is the simplest form of medical treatment imaginable. *See Furgeson v. City of Charleston*, 308 F.3d 380, 403 (4th Cir. 2002) ("The physical strain of labor, birth, or serious illness will have a deleterious effect on the mental process, limiting ability to rationally consider whatever choices he has.").

III. Conclusion

No reasonable jurist could conclude that the custodial statements given by Davila were born of valid consent.

CLAIM NINE: The Trial Court Erred In Overruling Davila's Motion to Preclude the Death Penalty As A Sentencing Option and Declare Tex. Crim. Proc. Code 37.071 Unconstitutional On the Grounds That Texas Law Allows For A Death Sentence Without Grand Jury Review of the Punishment Special Issues in violation of the Fifth and Fourteenth Amendments

Exhaustion: This Claim was raised as point of error twelve in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that Court. *See Davila v. State*, AP-76,105, 2011 WL 303265 at 12 (Tex. Crim. App. 2011).

The grand jury in Davila's case was called upon to determine whether probable cause existed to believe that he murdered Queshawn and Annette Stevenson; however, the grand jury, pursuant to Texas law, was not required to weigh (and therefore did not weigh) the special punishment issues. CR at 2-3.

The Fifth Amendment to the United States Constitution demands that no person be held to answer "for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V; *Jones v United States*, 526 U.S. 227, 243 n. 6 (1999). The Fifth Amendment thus requires that a defendant charged with a felony offense be given notice by indictment of the charges against him.

Likewise, the [sic] both the Fifth and Fourteenth Amendments to the United States Constitution forbid the government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amends. V; XIV.

In *United States v. Robinson*, the Fifth Circuit considered the issue of whether aggravating factors that render a defendant eligible for the death penalty must be alleged in the indictment. 367 F.3d 278, 294 (5th Cir. 2004). Relying on the Supreme Court's decision in *Ring v. Arizona*, the court in *Robinson* held that the Fifth Amendment demands that aggravating factors that render a particular defendant eligible for the death penalty are, in fact, elements of the offense. *Id.* Therefore, the government is required to charge, by indictment, those statutory aggravating factors that it

intends to prove at trial and render a defendant eligible for the death penalty. *Id.* Thus, the government's failure to do so was constitutional error. *Id.*; *accord United States v. Allen*, 357 F.3d 745, 748 (8th Cir. 2004) (aggravating factors essential to qualify a particular defendant as death eligible must be alleged in the indictment). *See also United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003) (recognizing that death eligibility factors are the "functional equivalent of elements of the capital offenses and must be charged in the indictment, submitted to the petit jury, and proved beyond a reasonable doubt").

The Texas Code of Criminal Procedure sets out the two "factors" that the jury must consider in a case in which the state has chosen to seek the death penalty. Tex. Code Crim. Proc. art 37.071. However, these factors are not presented to or passed on by the grand jury that returns the indictment. In light of recent Supreme Court jurisprudence, there is only one logical inference to be drawn: the aggravating and mitigating "factors" that a Texas jury must consider in the sentencing phase of a capital trial are, in fact, elements of the offense that must be alleged in the indictment and proven beyond a reasonable doubt. *See, e.g.*, *Ring*, 536 U.S. at 602, 12 S.Ct. at 2439.

As it presently stands, the Texas statutory scheme permits the state to bypass the grand jury indictment process and to arbitrarily determine which defendants it deems are "death worthy." This provision runs afoul of the Due Process Clause of the Fifth Amendment and

the due process rights guarantees set forth in the Fourteenth Amendment to the United States Constitution. It not only defies logic, but also federal criminal jurisprudence, to permit a state statutory provision to circumvent the Fifth Amendment and afford its citizens fewer protections than those provided to citizens charged with a federal offense. The protections afforded by the Fifth Amendment to citizens charged with a federal offense must likewise be extended to citizens charged with state offenses. Thus, in light of recent Supreme Court jurisprudence, the Texas statutory scheme, which permits the State to seek the death penalty in any given case – independent of and subsequent to the return by a grand jury of the underlying indictment – is constitutionally impermissible. *See, e.g.*, *Jones*, 526 U.S. at 232, 119 S. Ct. at 1219.

I. The Court of Criminal Appeals' decision.

The Court of Criminal Appeals (CCA), in reaching its decision on this claim, recognized that federal jurisprudence has established "that a federal indictment charging a defendant with capital murder must allege the aggravating factors that render a defendant eligible for the death penalty in the indictment." *Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011). However, the CCA believed the federal precedent to be inapplicable because the "federal constitutional right to indictment in a felony case does not apply to the states." *Id.* (citing *Albright v. Oliver*, 510 U.S. 266, 272 (1994)). Further, the CCA mistakenly believed that "the indictment in this case did allege the

aggravating factors that elevated this case from a murder charge under Section 19.02 of the Texas Penal Code to capital murder – a murder that is eligible for imposition of the death penalty – under Section 19.03(a)(7)(A)."

The CCA's decision was contrary to clearly established federal law because it applied a rule contradicting the governing law established by the Supreme Court. In its holding, the CCA failed to recognize that the Majority of Justices in *Albright* actually agreed that "the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime." *Albright v. Oliver*, 510 U.S. 266, 316 (1994) (Stevens, J., dissenting). Further, in determining that the indictment in this case alleged all aggravating factors necessary for a death sentence, the CCA failed to recognize clearly established Supreme Court precedent holding that any increase in a defendant's punishment, contingent on a finding of fact, is treated as an element of the offense. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 585-86 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.").

II. The capital sentencing scheme in Texas requires certain findings be made before an inmate may be sentenced to death.

In support of its decision that all necessary elements of capital murder were alleged in the indictment, the CCA stated that "the indictment in this case did allege the aggravating factors that elevated this case from a murder charge under Section 19.02 of the Texas Penal Code to capital murder – a murder that is eligible for imposition of the death penalty – under Section 19.03(a)(7)(A)." *Davila*, 2011 WL 303265 at 10. The court went on to explain that "[a]ny capital-murder charge under Section 19.03 makes a defendant eligible for the death penalty under Article 37.071 if the State seeks the death penalty in the particular case. The elements of capital murder alleged under Section 19.03 suffice to put the defendant on notice that the State may seek the death penalty." *Id.*

Texas Penal Code § 19.03 establishes multiple ways a person can commit capital murder. Relevant to Davila's Writ is the idea that a person commits capital murder if "the person murders more than one person during the same criminal transaction." Tex. Penal Code § 19.03(a)(7)(A). Importantly, a person convicted of a capital felony in which the state seeks the death penalty will be sentenced either to life in prison without parole, or to death. Tex. Penal Code § 12.31(a). Further, a sentence of death can only be imposed after the jury has answered two questions unanimously:

1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

2. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Tex. Code Crim. Proc. art. 37.071(b)(1), (e)(1). In order for a sentence of death to result, the jury must be convinced beyond a reasonable doubt that the answer to issue number one is "yes," and also answer issue number two "no." *Id.* at (c), (g). Restated, the death penalty cannot be handed down based solely on a conviction for capital murder; only after additional factors have been found, can a person be sentenced to death. *Id.*

A. The CCA failed to grasp that the sentencing questions are necessary elements for a death sentence.

By partly basing their decision on the notion that "[a]ny capital-murder charge under Section 19.03 makes a defendant eligible for the death penalty under Article 37.071 if the State seeks the death penalty in the particular case," the CCA failed to recognize that the Texas special issues are facts "that increase the

maximum penalty for a crime" and "must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (citing *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999))

Apprendi dealt with a New Jersey statute permitting an enhanced sentence for persons who committed a "hate crime." *Id.* at 470. Under the statute, a judge could increase a defendant's punishment based on a judicial finding that an offense was indeed a "hate crime." *Id.* at 470-71. In striking down the statute, the Supreme Court first discussed its recent decision in *Jones v. United States*, where it "noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476 (2000) (citing *Jones*, 526 U.S. at 243, n. 6). The Court found that the "Fourteenth Amendment commands the same answer in this case involving a state statute." *Id.*

In reaching its ruling, the Court explained that traditionally a particular crime carried a particular sentence:

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our

> Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. *See* 4 Blackstone *479 369-370 (after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, "the court *must pronounce that judgment, which the law hath annexed to the crime.*" (emphasis added)).

Id. at 478-79. The Supreme Court reasoned that our founders expected people to understand the nature of punishment sought by the state based on the indictment brought against them. Thus, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 490 (internal citation omitted).

Strangely, the Court also decided that the *Apprendi* decision did not affect its prior jurisprudence related to capital sentencing. *Id.* at 496-97. However, the Court changed its mind in *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring*'s holding was straightforward:

> *Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring v. Arizona, 536 U.S. 584, 589 (2002). *Ring*'s discussion of Arizona's capital scheme makes it clear that the Texas special issues, regardless of the CCA's impression, are facts that increase a defendant's maximum punishment.

The Court described Arizona's capital system:

> The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13-703." Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001). The cross-referenced section, § 13-703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed." § 13-703(C) (West Supp.2001). The statute further instructs: "The hearing shall be conducted before the

> court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Ibid.*

Id. at 592. Before a death sentence can be imposed, the state judge must find at least one aggravating circumstance and find there are no mitigating factors sufficient to warrant a death sentence. *Id.* at 593. Just like Texas' system, Arizona's statutory scheme permits death based on an indictment for first degree murder, but the death sentence can only be imposed after certain factors are found. In both Texas and Arizona, "[b]ased solely on the jury's verdict finding [a defendant] guilty . . . the maximum punishment he could have received was life imprisonment." *Id.* at 597.

The Supreme Court went on to hold that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494, n. 19). For the same reason, Texas' enumerated special issues are the functional equivalent of an element of a greater offense and should be included in the indictment passed upon by a grand jury.

III. The CCA failed to recognize that the grand jury requirement applies with equal force to the states.

In *United States v. Robinson*, the parties and the Fifth Circuit all agreed that an indictment that fails specifically to charge the aggravating factors that render a defendant eligible for the death penalty is constitutionally deficient. 367 F.3d 278, 281 (5th Cir. 2004). This follows the *Apprendi* Court's affirmance of the well-established principle that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476. The CCA nevertheless believed that "[t]he federal constitutional right to indictment in a felony case does not apply to the states." *Davila v. State*, 2011 WL 303265 at 10 (citing *Albright v. Oliver*, 510 U.S. 266, 272 (1994)).

However, the CCA misinterpreted *Albright*. *Albright* merely held that where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" such a claim. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (citing *Graham v. Connor*, 490 U.S. 386, 395). The Supreme Court in *Albright* ruled that the Petitioner failed to assert a claim in his 1983 action against a police officer for subjecting him to prosecution without probable cause, because the

petitioner incorrectly based the claim on substantive due process, rather than the Fourth Amendment.

During its discussion of substantive due process, the Supreme Court noted that "*Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury." *Albright*, 510 U.S. at 272 (1994) (citing *Hurtado v. California*, 110 U.S. 516, 527). This is, no doubt, where the CCA got its idea that the Fifth Amendment grand jury requirement did not apply to the states. However, the context of the *Hurtado* discussion in *Albright* shows that Supreme Court was actually distancing itself from the outdated *Hurtado* decision.

The Supreme Court was explaining that the Due Process Clause of the Fourteenth Amendment had incorporated many of the provisions of the Bill of Rights and applied them to the states, a process known as procedural due process, rather than extended those rights under the more elusive substantive due process:

> *Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury. In the more than 100 years which have elapsed since *Hurtado* was decided, the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth

Amendment. See *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), and holding the Fourth Amendment's exclusionary rule applicable to the States; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), overruling *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), and holding the Fifth Amendment's privilege against self-incrimination applicable to the States; *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), overruling *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), and holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), overruling *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), and holding that the Sixth Amendment's right to counsel was applicable to the States. See also *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) (Sixth Amendment speedy trial right applicable to the States); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (Sixth Amendment right to compulsory process applicable to the States); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment right to jury trial applicable to the States).

Id. at 272-73. A careful review of the *Albright* case shows that the Court was actually calling into question the *Hurtado* decision.[12]

Further, it is important to note that the *majority of justices involved in the Albright plurality believed that some oversight was necessary before a criminal prosecution could commence.* For example, Justice Scalia's concurrence pointed out that substantive due process should not be relied upon where the Bill of Rights already addressed the issue at hand. *Id.* at 275-76 (Scalia, J., concurring). He further explained that "[t]he Bill of Rights sets forth, in the Fifth and Sixth Amendments, procedural guarantees relating to the period before and during trial, including a guarantee (the Grand Jury Clause) regarding the manner of indictment. Those requirements are not to be supplemented through the device of 'substantive due process.'" *Id.* at 276 (Scalia, J., concurring).

Further, as pointed out by Justice Stevens in his dissent, the plurality in *Albright* did not "take issue with the proposition that commencement of a criminal case deprives the accused of liberty, or that the state has a duty to make a probable-cause determination before filing charges." *Id.* at 300 (Stevens, J., dissenting). Indeed, Justice Stevens recognized that "[o]f greatest importance, in the aggregate those opinions do not reject my principal submission: the Due Process Clause of the Fourteenth Amendment constrains the power of

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[12] The *Hurtado* Court's reasoning was specifically rejected in *Powell v. Alabama*, 287 U.S. 45, 65-66 (1932).

state governments to accuse a citizen of an infamous crime." *Id.* at 316 (Stevens, J., dissenting). As Justice Stevens recognized, the Due Process Clause of the Fourteenth Amendment requires, at a minimum, that there be some probable cause determination before the initiation of a prosecution for an infamous crime. Thus, the Grand Jury Clause of the Fifth Amendment clearly applies to the states.

For this reason, the State of Texas violated Davila's constitutional rights by subjecting him to prosecution for a capital offense without first submitting all necessary elements to the grand jury for review.

IV. This Court should set aside Davila's conviction

The only remedy available for Davila is for this Court to set aside his conviction for capital murder and order the State of Texas either to release him, or to bring him to trial after properly submitting all necessary elements to a grand jury for review.

CLAIM TEN: The Trial Court Erred in Overruling Davila's Objection to the Constitutionality of Texas's So-Called "10-12 Rule"

Exhaustion: This Claim was raised as point of error thirteen in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that

court. *See Davila v. State*, AP-76,105, 2011 WL 303265 at 12 (Tex. Crim. App. 2011).

Davila argues that the Texas capital sentencing scheme, by affirmatively misleading jurors about their individual ability to give effect to their personal beliefs regarding mitigation, violates the Sixth, Eighth, and Fourteenth Amendments. This claim is based on *Mills v. Maryland*, where the Supreme Court ruled that the petitioner's sentence could not stand where it was possible that some "jurors were prevented from considering factors which may call for a less severe penalty [than death]." 486 U.S. 367, 376 (1988). As the Fifth Circuit has repeatedly recognized, "[s]ubsequent to *Mills*, the Supreme Court has explained that '*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *See, e.g.*, *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir. 2000) (citing *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990)); *Jacobs v. Scott*, 31 F.3d 1319, 1328 (5th Cir. 1994).

The constitutional defect with Texas' current jury instructions is that they, by statute and as applied in Davila's case, mislead jurors about their individual ability to give effect to mitigating circumstances. *See* CR at 1936-38. Although Texas' sentencing statute gives individual jurors the power to prevent the death penalty if they believe mitigating circumstances call for a sentence of life, that same statute also misleads jurors into believing their individual beliefs are immaterial unless they are able to persuade nine of their

fellow jurors that their view of the evidence is correct. *See* Tex. Code of Crim. Proc. art. 37.071 § 2.

At the crux of this case, then, is the critical question: Could any member of the jury have interpreted the court's charge to mean that unless it either reached ten votes against the death penalty, or twelve votes in favor of the death penalty, that it would be deadlocked and force a mistrial? The answer is undoubtedly "yes." The jurors here were never informed, in plain and simple language, that if even one of them believed the death penalty should not be imposed, Davila could not be sentenced to death and that juror's holdout *would not* result in a hung jury. A reasonable juror would have believed that she had no ability – short of causing a hung jury – to determine that Davila deserved life in prison as a result of mitigating factors, unless nine other jurors agreed with her.

I. The "10-12 Rule" creates an impermissible risk of arbitrariness in violation of the Eighth and Fourteenth Amendments.

The requirement that a death sentence not be imposed arbitrarily is derived from the "Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). It was chiefly the concern that decisions of life and death were being made arbitrarily that led the Supreme Court in 1972 to

declare the death penalty to be in violation of the Eighth and Fourteenth Amendments to the Constitution. *See generally Furman v. Georgia*, 408 U.S. 238 (1972). In capital cases, therefore, the trial court is committed to ensuring that there is sufficient process to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim . . . or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (overruled on other grounds).

The 10-12 Rule affirmatively creates confusion in the minds of the jurors. Jurors are first told that the jury as a whole "shall" answer "yes" or "no" to each issue presented. Art. 37.071 § 2(f)(1). They are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another. Art. 37.071 § 2(f)(2). This necessarily raises the question of what happens in the event that the jury, despite being instructed that it must answer each question, is unable to get the minimum number of votes required to give either answer.

The Code of Criminal Procedure clearly provides that in the event of a non-answer, the defendant is to receive a sentence that is identical to that which he or she would have received if the verdict had been in favor of life. Tex. Code Crim. Proc. art. 37.071§ 2(g). The law itself exhibits no facially apparent confusion with regard to the situation presented: "If the jury . . . *is unable to answer any issue submitted under Subsection (b) or (e)*, the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice

for life imprisonment without parole." *Id.* (emphasis added).

However, the statute actively prohibits any clarification of the confusion by preventing jurors from being informed at any point of the effect of a non-answer. *Id.* §§ 2(f)(1), 2(f)(2).

It is true that state legislatures are afforded discretion to decide what information is relevant to a capital sentencing determination, and are thus able to exclude some information from jury instructions. *See California v. Ramos*, 463 U.S. 992, 1001 (1983) (holding that the Court generally "defer[s] to the State's choice of substantive factors relevant to the penalty determination"). However, that discretion is bound by the requirements of due process. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring); *Ramdass v. Angelone*, 530 U.S. 156, 195 (2000) (Stevens, J., dissenting); *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001); *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002).

In *Ramos*, the Court permitted a jury instruction regarding the state governor's commutation powers on the ground that the instruction was both accurate and relevant to a legitimate state penological interest. *Ramos*, 463 U.S. at 1001-06. Despite being prompted to apply *Ramos* in *Caldwell*, the Court refused, holding that when the state argues that automatic appellate review is meant to determine whether the death penalty is appropriate in a given case, this information not only inaccurately depicts the role of the appellate

court, but more importantly, it serves an illegitimate state purpose by diminishing the ability of jurors to feel the gravity of their task. *Caldwell*, 472 U.S. at 336-41.

The Texas procedural rules and corresponding jury instructions are equally inaccurate and illegitimate. When the jury is instructed that it may not "assess" [or reach] a verdict of life unless ten or more jurors agree upon an answer supporting a life sentence in response to at least one of the two issues, it provides the decision maker an incorrect statement of the very law it is required to follow. The *truth*, which is actively kept from the decision maker, is that if only one juror concludes that sufficient mitigation exists to warrant the imposition of a life sentence, despite that juror's inability to convince nine other jurors of his or her position, a life sentence will be imposed. This situation is unique to capital sentencing juries. During the guilt/innocence phase of a criminal trial, the jury is explicitly told that unanimity is required for either a verdict of guilt or acquittal. Although anything short of unanimity will lead to a mistrial, and thus might lead the defendant to be released as though he were acquitted, he may still be retried and is thus unable to claim numerous basic constitutional protections such as that of double jeopardy.

Under the Texas capital sentencing scheme, while the legislature might prefer a life sentence that results from the agreement of ten jurors to a default sentence resulting from a single holdout juror, the position of the defendant is identical in both. *See Padgett v. State*, 717

S.W.2d 55, 58 (Tex. Cr. App. 1986) (holding that "a jury's inability to answer a punishment question in a capital murder case, has the same sentencing effect as a negative answer"). Thus, instructing the jury that ten or more of them must agree upon a "life" answer in order to sentence the defendant to life, regardless of whether the court informs the jury of the effects of a non-answer, is a *patently* incorrect statement of the law. So long as the Texas statute equates the sentencing consequences of a life verdict with the consequences of a non-verdict, the jury must not be misled to believe that anything more than one vote for life is required to secure that sentence. The falsity of the instructions, by the very falsity, functions to impose on life-leaning jurors a burden to persuade other jurors when no such burden exists under the law.

This was not the case prior to 1981. Under Texas' former capital sentencing statute, if a jury failed to respond to either of the special issues, the result was a complete mistrial – requiring a new trial, not just on sentencing, but on guilt as well. *See Eads v. State*, 598 S.W.2d 304, 308 (Tex. Cr. App. 1980). Under such a scheme, setting aside the other arguments proffered here, an instruction that ten or more jurors are required for a life sentence would be just as unobjectionable as an instruction that unanimity is required for death, a finding of guilty, or an acquittal. Presumably in response to *Eads* and the additional costs and difficulties that such a situation would pose, in 1981 the Texas Legislature amended the death penalty statute, inserting the default sentence of life in the event of a

non-answer. At this time the Legislature also added the infirm language that is now in Article 37.071 § 2(a), prohibiting jurors from being informed of this default result. It is clear that the Legislature wished to change the sentencing reality of defendants without informing jurors of this change. In doing so, however, the legislative change made the old instructions inaccurate depictions of the law.

Not only are the instructions inaccurate, but they were intended to be inaccurate and confusing in order to serve an illegitimate state interest. Just as jurors who are informed that their decision will be reviewed for appropriateness by an appellate court are impermissibly led to deflect their profound responsibility onto the appellate courts, Texas jurors are impermissibly led to relieve themselves of a sense of responsibility by placing it either upon the other jurors who are unwilling to join the vote in favor of life or upon the statutory scheme that purports to require ten votes, rather than merely one, in order to give a life sentence. The principle behind *Caldwell* is that courts must ensure that jurors are not invited to place their individual responsibility onto anyone else. *Caldwell*, 472 U.S. at 329. Just as it is impermissible to lead jurors to place that responsibility upon the appellate courts, it is impermissible to lead them to place it upon their fellow jurors, or upon a restrictive sentencing statute.

The result of misinforming jurors and forcing them to deliberate without knowledge of what happens in the event of a non-answer is that they are presented

with a false dilemma. Jurors are given general instructions that they must answer either "yes" or "no" to the issues before them and specific instructions that define the minimum number of votes required to give each of these answers. Because they are told that a death sentence follows from one set of answers and a life sentence follows from another, a reasonable juror might conclude that the only way to get either of these punishments is to answer the questions posed to them. *See California v. Brown*, 479 U.S. 538, 541 (1987) (quoting *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985) (holding that the constitutional sufficiency of capital sentencing instructions is determined by "what a reasonable juror could have understood the charge as meaning")). This leaves jurors free to speculate as to what would occur should they be unable to provide an answer to the issues. While it is possible that jurors might correctly guess that the failure to agree will result in a life sentence, it is perhaps more likely that they will conclude that a non-answer will lead to a lesser sentence, a costly retrial or resentencing proceeding, or absolute freedom for the defendant. Given that each of the jurors has already found the defendant guilty of a capital offense, none of these options would look desirable to a juror who honestly believes that a life sentence is warranted.

In *Simmons v. South Carolina*, the Court prohibited just this sort of unfairness, holding that "[t]he State may not create a false dilemma by advancing generalized arguments regarding the defendant's

future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Simmons*, 512 U.S. at 171. The Texas statute instructs jurors that at least ten of them must agree in order for a life sentence to be imposed, yet it prohibits jurors from learning that only one vote is actually required for a life sentence. It is precisely because jurors are left to speculate when capital juries are not informed of the consequences of a deadlock that several states have declared the practice violate [sic] the Eighth Amendment. *See, e.g.*, *Louisiana v. Williams*, 392 So.2d 619, 634-35 (1980) (holding that "by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action"); *State v. Ramseur*, 106 N.J. 123, 314 (1987) ("[T]he jury must be told, in effect, that the law recognizes deadlock as a permissible result, an outcome allowed by the statute, a legal trial verdict that by law results in imprisonment rather than death.").

While this confusion might pressure jurors to change their position in order to avoid the unknown third option, it might lead to an even more basic misunderstanding. Because jurors are told that each question must be answered, and ballots do not include an option for non-answer, a reasonable juror following the instructions might believe that a non-answer is not only undesirable, but is in fact impermissible. Such a juror might believe that because he or she is unable to

secure the ten votes required to give the answer that that juror wishes the jury to give, and because some answer either way must be given, that juror is in fact obliged to vote with the others and sentence the defendant to death. Although the law is clear that a death sentence must never be mandatory, and individual jurors must always be free to vote for life, the opposite conclusion reasonably follows from the instructions mandated by the Texas sentencing scheme. In fact, jurors often mistakenly believe that they are required by law to impose death."[13] One study found that when jurors asked for clarification and were simply referred back to the original instructions, rather than being disavowed of their false belief, they became more likely to mistakenly believe that the evidence required them to vote for death.[14] This is precisely what the Texas statute requires when jurors ask questions regarding the implications of a non-answer. Art. 37.071 § 2(a)(1). The Texas statute provides instructions that lead jurors to

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[13] *See generally* Garvey, Stephen P., Sheri Lynn Johnson, and Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000). Another study identified other significant misconceptions among capital jurors regarding the sentencing process: "About half the jurors incorrectly believe that a mitigating factor must be proved beyond a reasonable doubt. Less than a third of jurors understand that mitigating factors need only be proved to the juror's personal satisfaction. The great majority of jurors – in excess of sixty percent in both life and death cases – erroneously believe that jurors must agree unanimously for a mitigating circumstance to support a vote against death." Eisenberg, Theodore, and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[14] Garvey, 85 Cornell L. Rev. at 639.

false beliefs regarding their sentencing options, and prohibit them from learning the true options, which functions to all but secure a sentence of death.

II. The "10-12 Rule" denied Davila his Eighth Amendment right to individualized sentencing.

The Constitution requires that Texas balance its obligation to minimize the risk of arbitrariness with the need for individualized sentencing. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death." *Woodson*, 428 U.S. at 304. To advance this demand, the Court subsequently held that "[t]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citation omitted). Later cases have clarified that such mitigating evidence need only be proven by a preponderance of the evidence. *See Walton v. Arizona*, 497 U.S. 639, 649-50 (1990) (overruled on other grounds). More importantly, the Court has unequivocally held, and the Texas statute clearly states, that a single juror must be permitted to consider and weigh mitigating evidence unilaterally, regardless of whether any other jurors accept the evidence as mitigation:

"[T]he jury . . . need not agree on what particular evidence supports an affirmative finding on the issue." Art. 37.071 § 2(f)(3). *See McKoy v. North Carolina*, 494 U.S. 433, 435 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988).

Although the capital sentencing jury resembles juries that sit in the guilt/innocence phase of capital and non-capital trials, its role is distinct. All juries have historically been expected "to secure unanimity by comparison of views, and by arguments among the jurors themselves." *Jones*, 527 U.S. at 382 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). The capital sentencing jury, however, is charged more precisely with the duty to "express the conscience of the community on the ultimate question of life or death." *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988). Because extraordinary protections are constitutionally required to ensure against unwarranted impositions of death, the Texas sentencing scheme, like the Louisiana statute, creates "a situation unique to the capital trial that a single juror, by persisting in a sentencing recommendation at variance with all of his fellow jurors, may alone cause imposition of a life sentence." *State v. Loyd*, 459 So.2d 498, 503 (La. 1984). The requirement of individualized sentencing in capital trials means not simply that defendants must be judged based upon their own character, but that they must be judged as such by individual jurors charged with considering the evidence and asked to make determinations of life and death. This clearly follows from the Court's demands that each individual juror be permitted to consider

mitigating evidence which that juror alone finds to exist simply by a preponderance of the evidence.

Members of a capital sentencing jury sit through the court's instructions, take an oath, and pass through the extraordinary process of death qualification. Because of this care, death penalty jurors, more than the members of any other jury, are unbiased, impartial, and capable of deliberation. It cannot be correct, therefore, to say that informing jurors of the effects of a deadlock would act as an "open invitation for the jury to avoid its responsibility and to disagree." *Davis v. State*, 782 S.W.2d 211, 221 (Tex Crim. App. 1989) (en Banc).

Giving the jury the truth would only serve to solemnize and make clear the responsibility each individual juror bears. As it stands, if a juror decides that sufficient mitigation exists to warrant a life sentence, and wishes to stick to that position despite the fact that it will prevent the jury from reaching a verdict, he acts under the impression that he would violate some abstract duty to "secure unanimity" or to not "disagree." Under the Texas sentencing statute, a juror would be abdicating his or her responsibility were he or she to not answer one of the questions. "The issues are framed in a manner which permits them to be answered either affirmatively or negatively, and it is the purpose of the deliberative process to resolve juror vacillation." *Nobles v. State*, 843 S.W.2d 503, 510 (Tex. Cr. App. 1992); Art. 37.071 § 2(f). Once deliberation has taken place and each juror has settled upon an answer to the two special issues, however, the failure of those

votes to meet the numerical requirements of the "12-10 [sic] Rule" cannot be considered a violation of the jury's duty. On the contrary, as the Supreme Court of New Jersey determined regarding New Jersey's statutory scheme, and is equally true under the Texas statutory scheme, a "capital jury does not 'avoid its responsibility' by disagreeing – genuine disagreement is a statutorily permissible conclusion of its deliberations." *State v. Ramseur*, 106 N.J. 123, 311 (N.J. 1987).

Indeed, *McKoy* and *Mills* together stand for the principle that the Constitution prohibits erecting barriers to prevent the jury from disagreeing. This is precisely what the "12-10 [sic] Rule" is – a barrier to prevent disagreement, the substantive effect of which is a statutory prohibition keeping individual jurors from having a "meaningful opportunity" to judge the defendant on the basis of mitigation. The rule creates the absolutely false appearance that while each juror may weigh mitigating evidence unilaterally, a minimum of ten jurors are required to pass judgment on such factors. This was precisely what the Court was concerned about in *McKoy* when it held "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy*, 494 U.S. at 442-43. It is not enough for Texas to inform the jury that they "need not agree on what particular evidence supports an affirmative finding on the issue [of mitigation]," if the effect of the entire instruction is that ten or more jurors must agree upon an affirmative finding in order to give effect to the finding of any one

juror. Tex. Code Crim. Proc. art. 37.071 § 2(f)(3). Each juror must be capable of giving effect to mitigating evidence when determining the appropriate punishment, and thus only one juror, not ten, must be sufficient under Article 37.071 § 2(f)(2) to answer "yes" to the mitigation issue presented by Article 37.071 § 2(e)(1). By instructing the jury that ten jurors are required in order to give a "yes" answer, the Texas statute violates the principles underlying *Mills* and *McKoy* by preventing individual jurors from having a meaningful opportunity to consider mitigating factors.

III. The "10-12 Rule" denied Davila his Sixth Amendment right to a fair and impartial jury.

As discussed above, the 10-12 Rule necessarily functions to create confusion in the minds of the jurors, and then prohibits them from having their confusion clarified. This was earlier discussed within the context of the additional Eighth Amendment safeguards required to reduce the risk of arbitrary and unreliable sentences. It is beyond dispute that capital juries are often dominated by misconceptions regarding the state of the law, the role of individual jurors, and the definition of key concepts such as mitigation. As discussed above, a reasonable juror who conscientiously attempts to understand the Texas sentencing statute might be led to believe that just as a sentence of death may not be imposed unless the jury is unanimous with regard to both special issues, a sentence of life may not be imposed unless at least ten jurors agree with

respect to at least one of the two special issues. Not only does this mistaken belief raise an Eighth Amendment problem with regard to arbitrariness and reliability, but the possibility that jurors might draw upon their preconceived notions to resolve such a situation raises Sixth Amendment concerns.

The right to an impartial jury has long been recognized as fundamental. *See, e.g.*, *Lockhart v. McCree*, 476 U.S. 162 (1986). This is particularly crucial in capital cases, where the Constitution demands that "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968).

To protect this right, courts are obliged to take reasonable steps to ensure the impartiality of a jury. It is for this reason that voir dire is made available to both parties, the judge is equipped with the power to strike jurors for cause, each party is granted a certain number of peremptory challenges, and jury instructions are fashioned to clarify the jury's role and impress upon them the importance of their task and the oath to which they have sworn.

By manufacturing confusion in the minds of the jury and preventing the court or the attorneys from correcting it, the 10-12 Rule creates fertile ground for jurors to draw upon their own biases and preconceived notions in coming to a verdict. This is particularly dangerous when jurors are confused about their sentencing options and the results of their sentencing

decisions. The concept of a hung jury is widely understood to be a disfavored result. In most trials, a hung jury leads to a mistrial, and most people understand that a mistrial will either lead to a costly retrial or to the dropping of charges. While neither of these undesirable outcomes would actually result from a hung jury in capital sentencing under the Texas statute, jurors are required to be kept in the dark with regard to that materially relevant fact. The 10-12 Rule forces the jury to wonder what would happen were they are unable to answer the special issues, possibly leads them to believe that an unacceptable third alternative other than life and death would follow, and then leaves them to draw upon their own preconceived notions in coming to a verdict. While the concept of a mistrial might be distasteful to a holdout and disfavored by the court during the guilt/innocence phase of a non-capital criminal trial, it is surely unacceptable to a juror in a capital sentencing proceeding who has already found the defendant guilty of capital murder. The risk that jurors will enter the courtroom with that misconception is too great to allow them to continue deliberating in the dark.

To ensure that capital juries do not rely upon their biases regarding hung juries during deliberations, jurors must either have their misperceptions corrected, or they must be examined for bias during voir dire. Because of the additional Eighth Amendment problems with forcing jurors to deliberate using false information, this Court should declare Article 37.071 § 2(a)

unconstitutional with respect to its prohibition on informing the jury of the effect of a deadlock.

IV. Ms. Sabrina Gundy was the holdout juror in Davila's trial.

The possibility that a single life-leaning juror would change her vote to death based on misleading instructions is especially relevant to Davila's case. In Davila's case, the jury retired to deliberate on punishment at 11:31 a.m. on February 26, 2009. 25 RR 79. They continued deliberating until 5:35 p.m. *Id.* at 80. It was not until 11:12 a.m. the next morning that the jury was able to reach a verdict. In her affidavit, filed by the State of Texas during the state writ proceedings, defense attorney Joetta Keene recalled watching juror Sabrina Gundy crying, alone, in a park before the jury came back with a verdict. Writ CR at 277. Ms. Keene explained, "I watch [sic] the older African-American woman sit alone. I watched her cry on that park bench. In that moment, I knew we were losing our last holdout." It is entirely possible that had Sabrina Gundy not been affirmatively misled about her individual power to prevent a death sentence, she would have exercised her individual power, a possibility that would mean the difference between life and death for Erick Davila.

Thus, in this case, like many others before it, the inadequate and misleading jury charged [sic] violated Appellant's Sixth, Eighth, and Fourteenth Amendment rights.

CLAIM ELEVEN: The Trial Court Erred in Overruling Davila's Motion to Instruct the Jury That the Sentencing Burden of Proof on the Mitigation Issue Lies With the State

Exhaustion: This Claim was raised as point of error fourteen in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that court. *See Davila v. State*, AP-76,105, 2011 WL 303265 at 12 (Tex. Crim. App. 2011).

The Fifth Amendment to the U.S. Constitution guarantees that no person may be deprived of liberty without due process of law, while the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amends. V, VI. The right to trial by jury in serious criminal cases is "fundamental to the American scheme of justice, and therefore applicable in state proceedings." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). A prosecution must prove all elements of the offense charged and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. *Id.* at 277-78. The Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. *Id.*

The trial court effectively deprived Davila of his right to a jury trial and his right to have all of the elements of the offense proven beyond a reasonable doubt,

as guaranteed under the Fifth and Sixth Amendments. Although the Court of Criminal Appeals (and, by extension, the United States District Courts of Texas) has previously declined to rule in favor of claims similar to Davila's, the conclusion properly drawn from the Supreme Court's decisions in *Apprendi v. New Jersey*, *Ring v. Arizona*, and *Cunningham v. California*, when considered in alongside the Texas death penalty statutory scheme, is inescapable: Because the mitigation issue in the Code of Criminal Procedure Art. 37.071 § 2 (Special Issue Number Two) increases the maximum penalty for the crime of capital murder, Texas' statutory scheme is unconstitutional for not requiring this issue to be submitted, proved, and found by the jury beyond a reasonable doubt.

I. Clear Supreme Court precedent demonstrates the myriad ways that the statutorily-mandated characterization of the Mitigation Special Issue is unconstitutional.

A. *Apprendi v. New Jersey*

In *Apprendi*, the defendant was convicted of a firearms offense under New Jersey state law. 530 U.S. 466 (2000). After Apprendi pleaded guilty, the prosecutor filed a motion, granted by the judge, to enhance his sentence under an independent "hate crime" statute that authorized imposition of a longer sentence if the trial court found by a preponderance of the evidence that the crime was motivated by racial bias. *Id.* at 469-71. The Supreme Court noted that *Apprendi*'s case squarely presented the issue of whether he had the

right to have a jury, rather than the trial court, decide whether his crime was motivated by bias. In *Apprendi*, the Court held:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Id. at 475-76. The Court reiterated that a criminal defendant's rights to due process, and the associated jury protections, extend not only to a defendant's trial on guilt or innocence, but also to determinations that affect the length of the defendant's sentence. *Id.* at 484 (citing *Almandarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

B. *Ring v. Arizona*

In *Ring*, the Court relied on its decisions in *Apprendi* and *Jones v. United States*, 526 U.S. 227 (1999) to review the constitutionality of a death sentence imposed under the Arizona state statutory sentencing scheme. *Ring v. Arizona*, 536 U.S. 584, 603 (2002). The Court concluded that, because Arizona state law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proven beyond a reasonable doubt to a jury rather than to the trial court. *Id.* The Court

also specifically overruled its earlier decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld an Arizona death sentence against a similar challenge. *Id.* at 589. Citing the irreconcilability of *Walton*'s result with its reasoning in *Apprendi*, the *Ring* Court came to the following intuitive conclusion: "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.*

When *Ring* was decided, Arizona's first degree murder statute provided that the offense was punishable by either death or life imprisonment. *Id.* at 592. The statute required the judge to hold a separate hearing and find all facts and circumstances to determine the appropriate sentence. *Id.* At the conclusion of the hearing, the judge was to determine the presence or absence of those aggravating or mitigating circumstances. *Id.* As the court in *Ring* pointed out, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Id.* at 597. The Court concluded that if the state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. *Id.* at 602.

Thus, "[a] defendant may not be expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* Integral to the Court's holding was

its review of Justice O'Connor's dissent in *Apprendi*, where she disagreed with the majority's interpretation of the Arizona death penalty statute, noting: "A defendant convicted of first degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting).

C. *Cunningham v. California*

More recently, the Supreme Court has reaffirmed that the Constitution requires that all facts relative to guilt or impacting punishment be found by a jury beyond a reasonable doubt. *Cunningham v. California*, 549 U.S. 270 (2007). In *Cunningham*, the Court considered and rejected a California statutory scheme that required the judge, rather than the jury, to find certain "circumstances in aggravation" relative to punishment in order to justify the imposition of the upper prison term. *Id.* at 275. The relevant California rule required only that circumstances in aggravation "shall be established by a preponderance of the evidence." *Id.* at 279. In determining that the rule in question was constitutionally infirm, the Court explained:

> "Because circumstances in aggravation are found by the judge and not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . the [rule] violates *Apprendi*'s bright-line rule:

> Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and be proved beyond a reasonable doubt.'"

Cunningham, 549 U.S. at 286 (quoting *Apprendi*, 530 U.S. at 490).

II. The Texas Death Penalty Statutory Scheme

Texas Penal Code § 19.03 defines the offense of capital murder, while § 12.31 sets out the punishment for capital felonies. Tex. Penal Code §§ 19.03, 12.31. Under § 12.31, an individual found guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by life imprisonment without parole, or by death. The Penal Code does not provide instruction as to which defendants found guilty of capital murder are eligible for death. For this, state law requires that the jury make additional findings pursuant to the Texas Code of Criminal Procedure Art. 37.071 § 2. Thus, like Arizona's statutory scheme discussed in *Ring*, the Texas death penalty statute requires cross-referencing and additional fact finding under another statutory provision before a defendant can be sentenced. *Ring*, 536 U.S. at 586. A defendant convicted of capital murder in Texas may not be sentenced to death until the jury makes additional findings of fact under Article 37.071 §§ 2(b) and 2(e).

In Texas, if a defendant is found guilty of a capital offense for which the state is seeking the death penalty,

the court must conduct a separate sentencing proceeding, before the jury, to determine whether the defendant should be sentenced to death or life imprisonment without parole. Art. 37.071 § 2(a)(1). At this proceeding, either side may present evidence on any matter that the court deems relevant to sentencing, including evidence of the defendant's background or character, or circumstances of the offense that support the imposition of the death penalty or mitigate against it. *Id.* At the conclusion of the evidence, Article 37.071 requires that the court submit special issues to the jury, including "the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* § 2(b)(1). If the jury returns an [sic] unanimous, affirmative finding on that issue, it must then decide:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance, or circumstances, to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Id. § 2(e)(1).

If the jury returns a negative finding on any issue submitted under § 2(b), or cannot reach a unanimous affirmative finding, the court must sentence the defendant to life imprisonment without parole. *Id.* § 2(g). Likewise, if the jury reaches an affirmative finding on

the issue under § 2(e)(1), or is unable to reach a unanimous negative result, the defendant must receive a life sentence without parole. *Id.* § 2(g). In other words, Texas law authorizes the trial court to sentence the defendant to death only if: (1) the jury unanimously finds there is evidence to prove, beyond a reasonable doubt, that the defendant will probably commit future acts of violence that pose a continuing threat to society; and (2) the jury unanimously agrees that the evidence in mitigation of the offense is not sufficient to warrant a sentence of life imprisonment rather than death. Thus, Davila could not be punished with a greater sentence – in this case, the death penalty – until and unless the jury *unanimously* found that (1) there was a probability that Davila would commit criminal acts of violence that would constitute a continuing threat to society, and (2) any mitigating evidence did not rise to a level to warrant a sentence of life imprisonment rather than a death sentence.

As the Supreme Court in *Ring* stated: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, 536 U.S. at 609. Likewise, Davila's right to a jury trial will be undermined if this Court holds that his Sixth Amendment right encompasses the right to have the jury find beyond a reasonable doubt that he was responsible for the deaths of the decedents, but not to find all the facts beyond a

reasonable doubt necessary before he is eligible for the death penalty to be imposed under Article 37.071.

Despite the obvious constitutional issues raised in requiring a defendant to prove that he is not "death-worthy," the Court of Criminal Appeals has continued to hold that "the burden is implicitly placed upon [the defendant] to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case." *Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995). *See also Allen v. State*, 108 S.W.3d 281, 285 (Tex Crim. App. 2003) (declining to consider sufficiency of the evidence to support the special issues). In *Lawton*, the Court of Criminal Appeals insisted that "there is no constitutional requirement that the burden of proof regarding mitigating evidence be placed on either party, and to the extent that the burden is on appellant . . . it is not unconstitutional to so place the burden." *Id.* at 557.

Likewise, in *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997), the Court of Criminal Appeals held that failing to assign a burden of proof on the mitigation issue, or placing the burden on the defendant rather than the State, does not render the Texas statutory scheme unconstitutional. *Id.* at 641. "In instances where mitigating evidence is presented, all that is constitutionally required is a vehicle by which the jury can consider and give effect to the mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. . . . [T]he absence of an explicit assignment of the burden of proof does not render Article 37.071 § 2(e) unconstitutional."

Id. Both *Cantu* and *Lawton* were squarely based on the Supreme Court's opinion in *Walton v. Arizona*. *Walton*, however, was expressly overruled by *Ring*. *Ring*, 536 U.S. at 609 ("[W]e hold that *Walton* and *Apprendi* are irreconcilable.").

The Fifth Circuit Court has likewise declined to shift the burden of proof from the defendant to the state on the issue of mitigation. In *Rowell v. Dretke*, the court addressed this issue in the context of whether the respondent had established that he was entitled to a certificate of appealability under 28 U.S.C. § 2253(c)(2). 398 F.3d 370 (5th Cir. 2005). The court held that *Ring* did not apply to Rowell's case because the Supreme Court did not contemplate that the Sixth Amendment's "reasonable doubt" requirement would extend to a capital sentencing jury's findings regarding mitigating factors. Instead, *Ring* focused exclusively on certain judicial findings regarding aggravating factors. *Rowell*, 398 F.3d at 877-78. The state argued, and the court agreed, that Rowell was foreclosed from relying on *Ring* and *Apprendi*, because unlike the statutory schemes challenged in those cases, the Texas mitigation special issue does not operate as "the functional equivalent of an element of a greater offense." *Id.* at 377.

In *Rowell*, the court correctly noted that the jury is the "entity that determines death eligibility beyond a reasonable doubt." However, the court upheld the Texas death penalty scheme as constitutional by reasoning that "mitigating evidence" under the Texas statutory scheme is a "fact in mitigation," which no

controlling authority required the state to prove beyond a reasonable doubt, rather than a "fact in aggravation of punishment." *Id.* at 376-78. The court in *Rowell* stated: "[N]o burden of proof exists for either the defendant or the State to prove or disprove mitigating evidence at the punishment phase. This is because the Supreme Court recognizes an important distinction between 'facts in aggravation of punishment and facts in mitigation.' Moreover, no Supreme Court or Fifth Circuit authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt." *Id.* at 378 (citing *Apprendi*, 530 U.S. at 490 n. 16).

As illustrated by the *Rowell* case, in rejecting the applicability of *Apprendi* to the Texas death penalty statute, courts have relied heavily on language from *Apprendi* stating that "the Court has often recognized [the distinction] between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 n. 16. However, read in context, *Apprendi* and *Cunningham* make clear that if a fact must be found by the jury *before* the defendant may be put to death, then that fact is an "element of the offense" that must be proved to the jury beyond a reasonable doubt. *Id.* at 490; *Cunningham*, 549 U.S. at 286. The Court in *Apprendi* was explicit on this point: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

Under *Apprendi, Ring*, and *Cunningham*, Special Issue Number Two is unconstitutional because it fails to place the burden on the state of proving a negative answer to the mitigation issue beyond a reasonable doubt. *See, e.g., United States v. Matthews*, 312 F.3d 652, 663 (5th Cir. 2002). In *Matthews*, the court held, consistent with *Apprendi*, held that any fact that increases the statutory maximum penalty must be found by a jury beyond a reasonable doubt, regardless of whether the legislature intended the fact to be a "sentencing factor" or an "element" of a separate offense. *Id.* The Texas statute cannot be saved simply because the required fact finding is labeled "mitigation." The Supreme Court has clarified that *Apprendi* repeatedly instructs that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative. *Ring*, 536 U.S. at 602; *see also Matthews*, 312 F.3d at 662-63. The dispositive question, then, is not one of form but of effect. *Ring*, 536 U.S. at 602. If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. *Id.* Article 37.071 provides that a defendant convicted of capital murder is not eligible for the death penalty until and unless the jury finds that there is not mitigating evidence that would justify a life sentence rather than death. Thus, whether the State of Texas calls Special Issue Number Two "facts in mitigation," rather than "facts in aggravation" or "sentencing factors," does not change the *effect* of the dispositive issue: the defendant in a capital murder case cannot be put to death (that

is, his level of punishment cannot be raised beyond life imprisonment) unless the jury makes findings of fact under Special Issue Number Two. Under clear Supreme Court precedent (*Ring*, *Apprendi*, and *Cunningham*), the mitigation issue is an element of the offense that the state must prove beyond a reasonable doubt before a defendant can be sentenced to death.

If the Texas statutory scheme provided that punishment for capital murder was automatically death, *unless facts in mitigation were shown*, then *Ring* would foreclose Davila's argument on this issue. However, "[a]ggravators operate as statutory 'elements' of capital murder under [Texas] law because in their absence, [the death] sentence is unavailable." *Ring*, 536 U.S. at 599 (citing *Walton v. Arizona*, 497 U.S. at 709 n. 1 (Stevens, J., dissenting)). Davila could not have been assessed the death penalty unless there was a negative finding on Special Issue Number Two. As a result, the statute has made the "absence" of mitigating circumstances an element that must be proven beyond a reasonable doubt.

The Texas death penalty scheme is unconstitutional because it impermissibly shifts the burden of proof on mitigation to the defendant. The statute requires the jury to consider, along with mitigating evidence, the "moral culpability of the defendant," having just found the defendant guilty of the offense, beyond a reasonable doubt. The statute then demands that the defense produce "sufficient" mitigation (while considering this same "moral culpability") to warrant a sentence of life imprisonment. The mitigating evidence

must be "sufficient" to reduce the defendant's moral culpability or blameworthiness as already established in the jurors' minds. In death penalty deliberations, "moral culpability" is not evidence – it is a finding that the jury has already made. The statute places an unfair, undue, and unconstitutional emphasis on that finding. The defendant, if he is to save his own life, must offer evidence that is somehow greater than the finding of moral culpability beyond a reasonable doubt.

Aside from shifting the burden of proof to the defendant, the statute provides no other guidance to the jury that is called upon to make this life and death decision. As a result, the death penalty is imposed in a wanton, haphazard manner in violation of the defendant's rights to due process and protection from cruel and unusual punishment.

This impermissible shift of the burden to the defense is made more unconscionable by the language of Article 37.071 § 2(f), which provides that the jury shall not answer the mitigation issue "yes" (resulting in a life sentence) unless ten or more jurors agree. The defense, according to the instructions to the jury, must then offer "sufficient" mitigating evidence to not only overcome his "moral culpability" as already established in the eyes of the jury, but ten of those jurors must be convinced of the sufficiency of that evidence.

Moreover, the effect of the statutory scheme is to require the defendant not merely to assume a burden of proving mitigation, but to demonstrate mitigation

sufficient to outweigh the jury's pre-existing affirmative finding, beyond a reasonable doubt, of the aggravating factor of future dangerousness. Davila is aware of the existence of adverse authority in this matter, but nonetheless contends that these issues merit the Court's serious reconsideration.

By not requiring the "beyond a reasonable doubt standard" to prove that element, the statutory scheme violates *Apprendi, Ring, Cunningham*, and the Sixth and Fourteenth Amendments to the United States Constitution. Therefore, this Court should reverse Davila's death sentence, and remand his case for a new hearing on punishment.

CLAIM TWELVE: Davila's Trial Was Contaminated By Improper Influence That Affected the Deliberations Process

Petitioner Davila raised this claim as a potential claim in his initial writ, but has chosen not to pursue this claim any further.

CLAIM THIRTEEN: Davila's conviction and sentence were obtained in violation of *Brady*

This claim was identified by Davila as a potential claim in his initial writ. However, after a more thorough review of the evidence in this case, including: a review of the Tarrant County District Attorney's Office file related to Davila's case, Davila's trial counsel's files (at least those of Ms. Keene; Mr. Fords file has never

been found after his passing), and the trial record, **Davila abandons this claim**. However, undersigned counsel feels the need to briefly identify the reason the claim was initially alleged, and the reason it is now being abandoned.

In *Brady v. Maryland*, the Supreme Court held that suppression by the State of "evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). During undersigned counsels' investigation an email between two members of the Fort Worth Police Department was found, which in relevant part explained "Sgt. Kevin Foster was at Cooks Children's Hospital on the night of the shooting . . . Sgt. Foster began talking to the father of the child that died later that night. The father related to Sgt. Foster that he believed the shooting was committed by gang members . . . The father indicated to Foster that he had been affiliated with the Polywood Crips." *See* Exhibit "C" (Filed under seal).

Initially undersigned counsel believed that this evidence had never been turned over to the defense, primarily because Jerry Stevenson's repeated denial of gang affiliation (15 RR 71-73, 92) was never specifically rebutted. However, a closer review of the record shows that while the defense might not have uncovered the specific email in question, it appears they did have information showing that Stevenson was indeed a rival gang member of Davila. For example, toward the beginning of the testimony in this case Officer

Jimmy Hewett testified that he had no knowledge that any Polywood Crips lived at the residence where the shooting occurred. 14 RR at 189-90. Immediately after Officer Hewett's answer defense Counsel Ford asked to approach, apparently to show Officer Hewett an inter-office memo he had prepared in this case. *Id.* Officer Hewett then remembered that he had indeed spoken to another officer who had informed him that the residents of the apartment were Crips, and that this information needed to be passed on. *Id.* at 196. Officer Hewett confirmed Crips living in the complex would be odd because the shooting took place in Blood Territory. *Id.*

Further, detective Johnson, lead detective in the case, answered in the affirmative on cross examination that he "had information that the residents of 5701 were Crips, and that the shooter was a possible Village Creek Blood." This information, coupled with Stevenson's affirmance that he was the only adult male present at the residence, 15 RR at 44, leads to the logical conclusion that, despite his denials, Stevenson was associated with the Crip Gang. In short, although the defense never established that it was Stevenson himself who admitted to police his involvement with the Crips, it appears the defense team did know of his involvement and of his statements to police.

Further, and more importantly, even had the [sic] Stevenson's statements not been disclosed by the State of Texas, Davila would not have been able to prove the withheld information was material. Evidence withheld by the state is material, and a new trial is required, if

there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. *See e.g. Giglio v. US.*, 405 U.S. 150, 154 ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."). Davila would not have been able to show materiality because the jury in his case clearly believed that he only intended to take the life of a single person, Jerry Stevenson. CR at 1931.

We know the jury believed Stevenson was the only intended target because of the note they sent the judge immediately before reaching their verdict. The note asked if capital murder required the specific intent to murder the specific victims, or if the only intent required was that "to murder a person and in the process took the lives of 2 others." CR at 1931. As explained in Claim Three, the jury would not have needed clarification if they believed Davila intended to harm the two victims of his shooting; the question was only relevant if they believed he solely intended to kill Jerry Stevenson. Further, it was the trial court's incorrect jury charge, not any withheld information, which permitted the jury to convict Davila in spite of their belief that he only harbored the intent to kill a single person. For these reasons, even if the defense did not know of Stevenson's statements affirming his gang involvement, Davila would not be able to show materiality as required by *Brady.*

For this reason Davila abandons this claim.

Conclusion

As this petition demonstrates, Petitioner Davila's rights under the U.S. Constitution were violated and unremedied by the Texas courts.

RELIEF REQUESTED

Prayer for Relief

WHEREFORE, Petitioner respectfully prays this Court:

1. Order that Petitioner be granted leave to conduct discovery pursuant to Rule 6 of the Rules Governing § 2254 Cases and permit Davila to utilize the processes of discovery set forth in Federal Rules of Civil Procedure 26-37, to the extent necessary to fully develop and identify the facts supporting his petition, and any defenses thereto raised by the Respondents' Answer;

2. Order that upon completion of discovery, Petitioner be granted leave to amend his petition to include any additional claims or allegations not presently known to him or his counsel, which are identified or uncovered in the course of discovery and that Davila be granted to [sic] leave to expand the record pursuant to Rule 7 of the Rules Governing § 2254 Cases to include additional materials related to the petition;

3. Grant an evidentiary hearing pursuant to Rule 8 of the Rules Governing § 2254 Cases at which proof may be offered concerning the allegations of this petition;

4. Issue a writ of habeas corpus to have Davila brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;

5. In the alternative to the relief requested in Paragraph 4, if this Court should deny the relief as requested in Paragraph 4, issue a writ of habeas corpus to have Davila brought before it to the end that he may be relieved of his unconstitutional sentences;

6. Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

WHEREFORE, PREMISES CONSIDERED, the Applicant DAVILA asks this Court to hold hearings, make its findings of fact and conclusions of law, and find that he was denied rights. He requests the Court to vacate his conviction and issue a writ to the Respondent, or the warden of the Polunsky Unit, ordering release of Davila from custody, or alternatively, to reverse Davila's conviction and order a new trial, or alternatively, to vacate his sentence of death and order a new trial on sentencing.

Respectfully submitted,

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COURT APPOINTED LAWYERS
FOR PETITIONER DAVILA

[Declaration Of Service And Verification Omitted]

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is currently available.
United States District Court,
N.D. Texas,
Fort Worth Division.

Erick Daniel DAVILA, Petitioner,
v.
William STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division, Respondent.

Civil Action No. 4:13-CV-506-O.
|
Signed April 21, 2015.

Attorneys and Law Firms

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Katherine D. Hayes, Office of the Texas Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

REED O'CONNOR, District Judge.

Erick Daniel Davila ("Davila") petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional because (1) the evidence adduced at trial was insufficient to support his conviction; (2) he was denied effective assistance of counsel at trial, on direct appeal, and at state habeas proceedings; (3) the trial court erred by

admitting his three written statements admitting to the commission of the offense of capital murder; (4) the trial court erred by admitting his written statement admitting to the commission of an extraneous murder offense; (5) the trial court erred by denying Davila's Motion to Preclude the Death Penalty as a Sentencing Option and Declare Tex.Crim. Proc.Code 37.071 Unconstitutional; (6) the trial court erred by overruling Davila's objection to Texas's "10-12 Rule"; and (7) the trial court erred by incorrectly instructing the jury regarding the burden of proof on the mitigation issue. Having reviewed the record, the briefs, and the exhibits tendered by the parties, the Court concludes that Davila is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), DENIES the petition, and DISMISSES this action with prejudice.

I. BACKGROUND

In February 2009, Davila was convicted and sentenced to death for the 2008 murder of an elderly woman, Annette Stevenson, and her grandchild, Queshawn Stevenson, in Tarrant County, Texas. *State v. Davila*, No. 1108359D (Crim. Dist. Ct. No. 1, Tarrant Co., Tex. Feb. 27, 2009). The Texas Court of Criminal Appeals ("CCA") affirmed the conviction in an unpublished opinion on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265 (Tex.Crim.App.2011). The Court takes the following recitation of facts from that opinion:

On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth. Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car." And then Cashmonae heard her grandmother, Annette Stevenson, say, "They trying to find trouble."

A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch. He kept shooting at them as the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as

> Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.
>
> . . .
>
> By the time the first police officer arrived, it was a chaotic scene. There was a dead woman – Annette Stevenson – in the back bedroom, a seriously injured child – Queshawn – on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Id. at *1-3. Following his appeal, Davila petitioned the United States Supreme Court for writ of certiorari, which was denied. *See Davila v. Texas*, ___ U.S. ___, 132 S.Ct. 258, 181 L.Ed.2d 150 (2011). While the appeal was pending, Davila's habeas counsel petitioned the convicting court for a writ of habeas corpus. The convicting court recommended that all claims be denied. Based on the convicting court's findings and conclusions and its own review of the record, the CCA denied relief in 2013. Ex parte Davila, No. WR-75356-01, 2013 WL 1655549 (Tex.Crim.App. Apr.17, 2013).

The Court appointed federal counsel, and Davila filed a petition for writ of habeas corpus and supporting brief on April 14, 2014 (ECF No. 16), which he amended on May 19, 2014 (ECF No. 17). Respondent filed its answer on September 4, 2014 (ECF No. 29), and Davila filed a reply on October 27, 2014 (ECF No. 33).

On May 19, 2014, Davila filed an Opposed Motion to Stay and Abet the proceedings, seeking to return to state court to exhaust his ineffective assistance of trial and appellate counsel claims. Mot. Stay, ECF No. 18. In its November 10, 2014 Order, this Court denied relief on the basis that Davila failed to establish good cause for his failure to exhaust the claims and because he failed to establish that the "unexhausted" claims were potentially meritorious. Order, Nov. 10, 2014, ECF No. 34. Davila additionally filed an Opposed Motion for Hearing on May 21, 2014, seeking an evidentiary hearing regarding the issue of whether any procedural default could be excused on the grounds of ineffective assistance of counsel rendered either on direct appeal or in state habeas proceedings. Mot. Hr'g, ECF No. 20. On November 10, 2014, this Court denied the motion without prejudice on the basis that Davila failed to identify facts that, if true, would entitle him to relief on his ineffective assistance of appellate counsel claim and on the basis that the Court had yet to address whether the state court adjudication was unreasonable. The habeas petition is now ripe for determination.

II. LEGAL STANDARD

This petition is subject to the AEDPA. *See* 28 U.S.C. § 2254. The Court will address the AEDPA standards of review where applicable to the issues raised. When a federal habeas petitioner challenges a prior state court adjudication on the merits, the AEDPA bars relitigation of the claim in federal court unless it (1) is "contrary to" federal law then clearly established in the holdings of the Supreme Court or "involved an unreasonable application of" such law, or (2) "is based on an unreasonable determination of the facts" in light of the record before the state court. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). This determination is limited to the record that was before the state court that adjudicated the claim on the merits. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). These conditions are meant to be difficult to meet and stop short of imposing a complete bar on the relitigation of claims already rejected in state proceedings. *Richter*, 131 S.Ct. at 786.

A state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts governing law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an different result. *Coleman v. Thaler*, 716 F.3d 895, 901 (5th Cir.2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court's application of law is "unreasonable" when the state court

identifies the correct governing legal principle but applies it unreasonably to the facts of a particular case. *Id.* at 901-02. The petitioner must show that the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786-87; *see also White v. Woodall*, ___ U.S. ___, ___, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 131 S.Ct. at 786; *Woodall*, 134. S.Ct. at 1702 (stating a "merely wrong" holding or "clear error" will not suffice).

Factual determinations in a state court's decision are presumed correct, and a petitioner bears the burden of rebutting them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Burt v. Titlow*, ___U.S. ___, ___, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013). A "decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow*, 134 S.Ct. at 15 (citing *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). The presumption of correctness attaches to explicit findings of fact as well as "unarticulated findings

which are necessary to the state court's conclusions of mixed law and fact." *Pippin v. Dretke*, 434 F.3d 782, 788 (5th Cir.2005) (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir.2003)). With this framework in mind, the Court turns to Davila's claims.

III. SUFFICIENCY OF THE EVIDENCE (CLAIM 1)

Davila first asserts that the evidence is legally insufficient to support his conviction for capital murder. Am. Pet. 36-45, ECF No. 17. Specifically, he contends that capital murder in Texas requires the specific intent to kill two people; thus, the evidence adduced at trial showing Davila only intended to shoot one individual is insufficient to support his conviction. *Id.* at 37. In response, Respondent argues that the evidence establishes that Davila intended to kill multiple gang members and the doctrine of transferred intent applies, which established sufficient intent to kill the two victims. Resp. 39, ECF No. 29. This claim was raised and rejected by the CCA on direct appeal.

A. Applicable Law

The standard set forth in *Jackson v. Virginia* applies where an appellant challenges the legal sufficiency of the evidence presented at the trial court supporting his conviction. 443 U.S. 307, 308, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex.Crim.App.2010) ("[T]he *Jackson v. Virginia* legal-sufficiency standard is the only

standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."). On federal habeas review, "the limited question before [the federal] court is whether the CCA's decision to reject [the petitioner's] sufficiency of the evidence claim . . . was an objectively unreasonable application of the clearly established federal law set out in *Jackson*." *Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir.2001). The evidence is sufficient to support the jury's verdict if, viewing the evidence in the light most favorable to the verdict, any rational juror could find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Martinez*, 255 F.3d at 244 n. 21. The *Jackson* standard is used to determine if the amount of evidence satisfies the Due Process Clause, while state law determines the substantive elements that must be proven. *Coleman v. Johnson*, ___ U.S. ___, ___, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012) (per curiam).

Texas Penal Code Section 19.03(a)(7)(A) provides that "[a] person commits [capital murder] if the person commits murder as defined under Section 19.02(b)(1) and . . . the person murders more than one person . . . during the same criminal transaction." Tex. Penal Code Ann. § 19.03(a)(7)(A) (West 2013). A person commits murder under Section 19.02(b)(1) where he "intentionally or knowingly causes the death of an individual." *Id.* at § 19.02(b)(1). In addition, under Texas law, the doctrine of transferred intent provides

that a person may be held "criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." *Id.* at § 6.04.

B. Evidence Presented

The CCA determined that there was "ample evidence in the record to support the jury's verdict that [Davila] intended to cause more than one death in his 'shoot em up' attack." *Davila*, 2011 WL 303265, at *4-5. Specifically, the CCA concluded that the evidence at trial established the following:

> The evidence shows that [Davila] intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As [Davila] himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.
>
> . . .
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> (1) [Davila] gave a written statement explaining that he intended to "get the fat dude" and who he mistakenly thought were three guys on the porch;

(2) Cashmonae testified (as did other witnesses) that [Davila] aimed the "red dot" at "different parts of the house" and at different persons;

(3) [Davila] used a high-powered SKS semi-automatic rifle with an infrared beam to fire between ten to fifteen bullets into the group of women and children on Ms. Stevenson's front porch;

(4) [Davila] fired a burst of bullets from one location across the street, then paused as he ran to the middle of the street and fired a second burst of bullets;

(5) [A witness] said that [Davila] looked "frustrated" after the first burst of fire when [Jerry Stevenson] had escaped into the house, so [Davila] moved and then fired a second burst at the remaining women and children;

(6) [Davila] used a rifle with an infra-red scope that would give him greater precision in shooting at what he intended to hit;

(7) His semi-automatic SKS required him to pull the trigger each time he intended to shoot; thus he intended to shoot his targets at least ten to fifteen different times;

(8) Expert testimony that [Davila's] choice of bullets, high-powered hollow-point bullets, was consistent with a shooter who wants to cause maximum damage or death to his intended target.

Id.

C. Analysis

Davila argues that the CCA's factual determinations were unreasonable. Am. Pet. 41, ECF No. 17. Specifically, Davila argues that the determination that "the jury's verdict showed Davila 'intended to cause more than one death in his 'shoot him up' attack'" is incorrect. *Id.* In support, he points to a note the jury sent during their deliberations. *Id.* The note stated: "In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others." Clerk's R. vol. 44 (Jury Note 2) 1931, ECF No. 10-44. Davila argues that this note "clearly established the jury believed Davila intended to murder 'a person.'" Am. Pet. 41, ECF No. 17. He further argues that the CCA improperly utilized his written statement "explaining that he intended to 'get the fat dude' and who he mistakenly thought were three guys on the porch" to establish that he intended to kill at least two individuals. *Id.* Davila argues that this was erroneous because Jerry Stevenson, whom Davila intended to kill, was the only adult male at the birthday party. *Id.* at 42. Davila further contends that the CCA incorrectly concluded that witness Cashmonae testified that Davila "aimed the 'red dot' at 'different parts of the house' and at different persons." *Id.* Finally, Davila argues that the CCA incorrectly summarized witness Eghosa Ogierumwense's testimony. *Id.* at 43-45. Although the CCA stated that Eghosa "said that [Davila] looked 'frustrated' after the first burst of fire when [Jerry Stevenson] had escaped into

the house, so [Davila] moved and then fired a second burst at the remaining women and children," Eghosa actually explained that the beam from Davila's weapon was first pointed on Stevenson and then was pointed on the windows of the home after Stevenson walked inside the home. *Id.* at 43.

The Court finds support in the record establishing that Davila had the intent to kill multiple individuals. Specifically, Davila's own written statement established that he intended to shoot four members of a rival gang. In addition, the testimony also established that Davila intended, at two separate times, to kill Jerry Stevenson. *See, e.g.*, *Ex Parte Norris*, 390 S.W.3d 338, 341 (Tex.Crim.App.2012) (noting defendant's intent to kill one individual on two separate instances was sufficient to establish capital murder under transferred intent theory). As a result, the CCA's decision to reject Davila's sufficiency of the evidence claim was not an objectively unreasonable application of the clearly established federal law set out in *Jackson*. *See Jackson*, 443 U.S. at 308. This claim is denied. *See* 28 U.S.C. § 2254(d)(1).

IV. ASSISTANCE OF TRIAL COUNSEL (CLAIMS 2 & 4)

Through state habeas counsel David Richards ("Richards"), Davila presented his ineffective assistance of trial counsel claim against Robert Ford and Joetta Keene ("trial counsel"). The habeas court granted Davila funding for a mitigation specialist,

conducted an evidentiary hearing, and issued Findings of Fact and Conclusions of Law, recommending that the claim be denied for a lack of merit. The CCA adopted the findings of fact and conclusions of law. *Ex parte Davila*, 2013 WL 1655549.

Davila now reasserts that his trial counsel rendered ineffective assistance by failing to properly investigate and present the mitigation case. Am. Pet. 46-79, ECF No. 17. Davila further maintains that Richards was ineffective during the state writ proceedings because Richards attempted to "wing it" at the state-writ hearing and inadequately presented the ineffective assistance of trial counsel claim. *Id.* at 91-102. In response, Respondent contends that the CCA reasonably rejected the ineffective assistance of trial counsel claim on the merits, and Davila has failed to meet his burden under § 2254. Resp. 40, ECF No. 29. The Court addresses each issue in turn.

A. Applicable Law

The clearly established federal law governing claims of ineffective assistance of trial counsel is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Williams v. Taylor*, 529 U.S. 362, 398-99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under *Strickland*, Davila must first demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The objective standard of reasonable representation is defined by prevailing professional norms and is

necessarily a general standard. *See Bobby v. Van Hook*, 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

Restatements of professional standards, such as the American Bar Association guidelines, are "only guides" to what is reasonable and are properly considered only to the extent they describe the prevailing professional norms and standard practice, and the restatements are not so detailed that they "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 8-9 n. 1. The Constitution imposes "one general requirement: that counsel make objectively reasonable choices." *Id.* at 9. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Pinholster*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at 690)). This standard not only gives trial counsel the benefit of the doubt, but affirmatively entertains the range of possible reasons counsel may have had for proceeding as they did. *Id.* at 1407.

Trial counsel's failure to reasonably investigate and present mitigating evidence to a sentencing jury, when such evidence would have been discovered by a reasonably competent defense attorney, amounts to ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Regarding counsel's duty to investigate, strategic decisions made by counsel following a thorough investigation are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. "[S]trategic choices made after a less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691.

Generally speaking, complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and allegations of what a witness would have stated are largely speculative. *See Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir.2010); *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). To prevail on this type of claim, the petitioner must name the witness, demonstrate that he was available to testify and would have done so, set out the content of the proposed testimony, and show that the testimony would have been favorable to a particular defense. *Id.* This showing is required for claims regarding uncalled lay and expert witnesses alike. *See, e.g.*, *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir.2002).

Next, Davila must demonstrate that there is a reasonable probability that prejudice, sufficient to undermine confidence in the trial outcome, resulted from counsel's deficiency. *See Strickland*, 466 U.S. at 694. A "reasonable probability" of prejudice requires a substantial, not just a conceivable, likelihood of a different outcome. *Pinholster*, 131 S.Ct. at 1403. For claims that challenge counsel's sentencing investigation, the reviewing court reconsiders the evidence in aggravation against the totality of available mitigating evidence and determines whether there is a probability, sufficient to undermine confidence in the outcome, that the jury would have assessed a life sentence. *See Wiggins*,

539 U.S. at 534. After reviewing all of the evidence, the court must ultimately "decide whether the additional mitigating evidence was so compelling that there was a reasonable probability that at least one juror could have determined that because of the defendant's reduced moral culpability, death was not an appropriate sentence." *Id.* (internal quotation marks omitted).

B. Relevant Facts

1. *Trial Counsel's Investigation*

At the state writ hearing, trial counsel Joetta Keene testified that she spent an estimated time of 100 hours and co-counsel Robert Ford spent an estimated time of 80 hours on the mitigation investigation alone.[1] State Habeas Rep. R. (vol.2) 27, 37. Keene testified that she and Ford met with multiple doctors. *Id.* at 37. Keene noted that although she and Ford worked with psychologist Dr. Emily Fallis ("Dr.Fallis") in preparing a PowerPoint presentation for trial, Keene and Ford remained in charge of the mitigation investigation. *Id.* at 27-28, 37. Because Davila had made an attempted escape from jail, Keene stated she felt the mitigation case was the "real issue" for purposes of punishment. She believed the mitigation investigation should not be delegated because she had to build relationships with her witnesses first. *Id.* at 28. So, with the help of their fact investigator, Keene and Ford would find and talk

[1] Robert Ford was unavailable to testify as a witness during the state habeas proceeding as he passed away weeks before the state habeas proceeding. State Habeas Rep. R. (vol.2) 27.

to witnesses. They would then refer certain persons to Dr. Fallis, who would interview them from the psychologist's standpoint. *Id.* Davila was also submitted for a psychological evaluation with Dr. Kelly Goodness and neurological testing with Dr. Dennis Zgaljardic. *Id.* at 8, 30. Keene noted that she and Ford spoke with many of Davila's former teachers, his employer, and many of his family members.[2] *Id.* at 30, 33-34.

2. *Aggravating Evidence*

The State introduced evidence that Davila attempted to escape from jail while awaiting trial, committed an aggravated robbery and an additional murder only two days before this capital offense, and was convicted of burglary of a habitation two years earlier. The State also introduced evidence of a traffic stop where a gun and marijuana were found in Davila's car and testimony about his presence as a security threat in the jail.

The State first called Gabriel Ramos who testified about an incident wherein Davila and two other individuals held Ramos and Ramos's boss at gunpoint while demanding money. Trial Tr. vol. 20 at 65:17-24,

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[2] In her affidavit, Keene noted that she and Ford spoke with the following members of Davila's family: (1) his mother, Sheila Olivas; (2) his father, Mario Davila; (3) his sisters, Emily Davila, Cynthia Olivas, and Vivianna Olivas; (4) Emily Davila's mother-in-law, Lisa Wallace; (5) his girlfriend, Nicole Blackwell; (6) his aunts, Debra Jones and Angie Jones; and (7) Mario Davila's mother, brother, and niece. State Habeas Clerk's R. (vol.2) 274-76.

ECF No. 11-22. Ramos related that the robbery occurred at 5:00 in the morning on April 4, 2008. *Id.* at 104:7-19. He noted that Davila held a gun to Ramos's boss's head while demanding that he give Davila all of his money. *Id.* at 89:1-5. At one point, one of Davila's cohorts feared that the cops were near and advised that they should leave. *Id.* at 91:5-25. Davila then released Ramos's boss and started to retreat to his vehicle. *Id.* However, as he was doing so, he stopped and returned to Ramos's boss and again placed his gun on his head. *Id.* It was only at Davila's cohorts' insistence that Davila returned to his own vehicle and left the scene. *Id.* at 91:19-25, 92:1-2. Ramos noted that it appeared that Davila was in charge of the robbery. *Id.* at 106:17-20.

The jury next heard from Detective Thomas Wayne Boetcher. Detective Boetcher took Davila's written confession regarding the extraneous murder of Darrell Ford and read the written confession to the jury:

> On the first part of the month, it was 4 Trey Day, April the 3rd. That's how I remember the day. I went to the convenience store on East Lancaster by the French Quarters. A friend of mine named Taylor *[sic]* was with me. We call him T. He hangs around East Lancaster. He wears red. He is not put down with any particular set.
>
> I was driving Nichcole's car, and Taylor was with me on the passenger side. We both went into the store, and when I came out and

started up the car, I let my window down on the driver's side, and then this old school man walked up to me. He was a black male about 37 years old. He walked up to me on the driver's side of the car while I was sitting in it. He didn't say nothing to me, he just pulled a pistol out on me and pointed it to my head.

I thought I was going to die in the car. I wait- I waited for Taylor, and he didn't come out. I-I told-I told him what happened, and he was surprised. We hung around the back of the apartments and smoking. We stayed out there all day, and finally went to leave around 4:00 a.m.

. . .

When we went to leave, we seen the dude talking to the lady and another dude. We were in the front of the store. The store was closed, and I got the strap from the back of the apartments earlier to get him. I told Tyler to let me off on East Lancaster, and I was going to walk up there.

I went up to the store, and I was walking-as I was walking to him, the guy said to me, what's up? And then he said, What's up G Money? I said, What, and I let him have it. I shot him as he walked towards me, and then I went and got back in the car with Tyler and went home. I shot him because he had drawn down on me earlier in the day and pointed a gun at my head.

Trial Tr. vol. 21 at 21:8-25, 22:1-5, 23:3-16, ECF No. 11-23.

Tanna Martinez, who was with Darrell Ford when he was shot, next testified. Martinez noted that she was a prostitute and Ford dealt illegal drugs and "watched out" for Martinez while she "was jumping in and out of cars, making sure nothing happened to [her]." *Id.* at 72:3-12, 73:18-25. She testified that on the evening of April 3, 2008, she and Ford were standing on the corner after just having smoked crack, when a black vehicle drove past them. *Id.* at 76:1-6. Martinez noted that the she and Ford noticed the vehicle because they thought the driver was looking to pick up a prostitute. *Id.* at 77:16-25, 78:1-2. They noticed that when the vehicle first drove past them, it had two occupants, but when it drove past them again, it only had one. *Id.* She then related that she then saw a man, who she later identified as Davila, walking towards her and Ford. *Id.* at 78:20-24. Davila held his head down and did not say anything to them. *Id.* Ford then asked Davila, "What's up," and Davila did not respond. *Id.* Davila then pulled out a gun and Ford told Martinez to turn and run. *Id.* at 79:3-9. Martinez turned to run, but then fell. *Id.* She then heard "pow, pow" and turned back around and saw that Ford had begun to run, but then hit the ground. *Id.* She noted that Davila then walked over to Ford and shot him four more times in the back. *Id.* at 79:11-12.

The jury later heard that Davila had previously been convicted and sentenced to prison on May 11, 2006, for the offense of burglary of a habitation. Trial

Tr. vol. 22 at 30:1-5, ECF No. 11-24. Davila was sentenced to three years confinement. *Id.*

The jury also heard from Arlington Police Officer Michael Moses. Officer Moses testified that he conducted a traffic stop on February 12, 2006, involving Davila. *Id.* at 32:13-15. During the stop, the officer found a small amount of marijuana on Davila's person, a loaded 9-millimeter pistol under the front seat of Davila's vehicle, and a brick of marijuana in the back seat of the vehicle. *Id.* at 44:5-6, 44:16-24, 46:1-2. Officer Moses noted that while Davila was cooperative at the beginning of the traffic stop, his demeanor changed when he was placed in the back of the officer's car. *Id.* at 47:1-15. Davila became verbally abusive with the officers. *Id.* During the course of Davila's transportation to the jail, he was able to maneuver his handcuffs from behind his back to the front of his body, which posed a security threat. *Id.* at 57:6-15. The officer finally testified that although he would normally escort a detainee alone into the prison, the officer felt that Davila was a significant security risk, and the officer required four or five jailers to assist him in extracting Davila from the cop car and escorting Davila to the jail. *Id.* at 58:4-6.

Charles Norton, a detention officer at the Tarrant County Sheriff's Department, additionally testified. He discussed one incident wherein he told Davila, who was using the payphone, to hang up the call and return to his cell so that the inmates could be administered their meals. *Id.* at 105:19-24. In response, Davila became argumentative with the officer and refused to

end the phone call. *Id.* at 105:23-25. Davila then began "cussing out" the officer and eventually hung up the phone. *Id.* at 106:1417. He then stated, "You don't know who you're messing with, you need to check my resume." *Id.* at 106:20-24. Ultimately, Davila complied with the officer's commands. *Id.* at 108:1-14.

Several other officers testified regarding the security threat that Davila posed while he was incarcerated and awaiting trial. One officer testified that he noticed Davila's nails were long and filed to a point. *Id.* at 126:14-16. This posed a potential safety issue for the jail staff members because officers had been scratched by inmates in the past. *Id.* at 126:18-20. Another officer testified that during a routine inspection of Davila's cell, the officer found contraband in Davila's cell. *Id.* at 135:6-8. When the inspection ended, Davila was instructed to come to the door so that the officers could remove his handcuffs. *Id.* at 134:1-3. Davila moved the handcuffs from behind his back to his front, refused to allow the officers to remove the handcuffs, and became argumentative. *Id.* at 135:1-5. The officer eventually had to spray Davila with "OC Spray"[3] to get him to comply with his orders. *Id.* at 135:9-10. The officer noted that Davila's behavior after he was sprayed was unusual because while most inmates become "more humble and . . . embarrassed," Davila "was singing, making jokes and taunting other inmates still in their cell and other officers." *Id.* at 136:5-8. Another officer testified that when Davila was being transferred for a

[3] The officer testified that "OC Spray" is a form of pepper spray. *Id.* at 134:13-17.

trial court proceeding, a hairpin was found in Davila's breast pocket of his jumpsuit. *Id.* at 182:21-24, 186:2-3. The officer noted that the hairpin was considered contraband because there was a "[p]ossibility that the hairpin could be used in a set of handcuffs, to get out of locking devices." *Id.* at 183:23-25.

Finally, detention officers testified about Davila's attempted escape from the jail where he was held prior to trial. The first officer to testify, Michael Thompson, noted that he was in charge of escorting Davila and four other inmates to the gym for their state-mandated recreation period. *Id.* at 160:12-13. Once the inmates were secured within the west gym, the officer went to complete paperwork. *Id.* at 161:15-19. However, as he was completing the paperwork, the inmates got the officer's attention and asked to move to the east gym because the floor of the west gym was damp. *Id.* at 162:14-20. As the officer moved the inmates to the east gym, three of them (including Davila) attacked the officer by punching and kicking him multiple times. *Id.* at 164:23-25, 165:1-4. The inmates took the officer's wallet and removed his keys from his holster. *Id.* at 166:9-14. The inmates then demanded an escape route. *Id.* at 166:17-24. The officer sent the inmates down the fire escape, knowing that it would lead them to a dead end. *Id.* Once the inmates left, the officer attempted to summon help. *Id.* at 168:1-12. He additionally noticed that his partner, Teresa Otterson, was also laying face down in the hallway in a pool of her own blood. *Id.* at 169:12-15. A fellow inmate who witnessed the attack noted that the inmates were hitting, kicking, and

stabbing Officer Thompson. *Id.* at 115:1-3. He noted that as they were attacking the officer, they were saying, "I'll kill you, and you know, you don't know me, you don't know what I'm in here for. I have nothing to lose. How do you get out of this building?" *Id.* at 116:24-25, 117:1-2.

A nurse who responded to the scene first found Officer Otterson. The nurse noted that Officer Otterson was lying face down with her arms stretched in front of her in a large pool of blood. *Id.* at 230:9-14. Although the nurse attempted to call her name, she did not respond. *Id.* At this point, the nurse feared that she was dead. *Id.* at 230:22-24. Once Officer Otterson regained consciousness, she was very disoriented and "had no idea that she really was even hurt." *Id.* at 231:10-14. Although she "kept rubbing at her hand and saying . . . what is this, I'm just a mess, I've just got stuff all over me," she did not realize it was her own blood. *Id.* In addition, a maintenance worker employed through Tarrant County Facilities testified. He testified that he was working to replace some light bulbs within the jail facility and was riding on an elevator with Officer Otterson to retrieve the light bulbs. *Id.* at 243:2-4. As the elevator door opened, the maintenance worker noted that Officer Otterson first walked out and was struck by an inmate wearing a cast. *Id.* at 243:15-19. The maintenance worker attempted to help Otterson. *Id.* As he was attempting to help her, he noticed that several inmates in various stages of undress and partially covered in blood spatter were approaching him. *Id.* at 245:123. He then turned and ran back onto the

elevator. *Id.* at 247:1-8. An inmate then struck him in the face and broke his nose. *Id.* at 247:22-24. A crime scene investigator dispatched to the scene later found a shank[4] inside the gym. Trial Tr. vol. 23 at 70:13-6, ECF No. 11-25.

3. *Mitigating Evidence at Trial*

Trial counsel first presented Allen Dennis, the chief deputy over housing for the Tarrant County Corrections center. Dennis noted that he reviewed the reports authored by several officers regarding Davila's attempted escape and assault of corrections officers. *Id.* at 199:2-6. Based on his review, he determined that the pat down search of the inmates was inadequate, that Officer Thompson's radio had not been properly checked out, and that the east and west gyms had not been properly inspected. *Id.* at 200:5-24, 202:6-14. Dennis additionally noted that the job assignment process for detention officers changed after the incident such that officers were required to rotate their assignments on a regular basis. *Id.* at 203:11-19. Ultimately, Dennis determined that the incident occurred, at least in part, as a result of "complacent lack of safety practices by both the officers involved." *Id.* at 209:2-7. Notably, however, Dennis attributed the biggest factor driving the assault to the "fact that you had three very aggressive individuals that wanted to get out of jail, and they were

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[4] An officer defined a shank as "a piece of metal or something sharp, hard . . . wrapped with cloth at the bottom to protect from unintentional injuries by the user," which is typically used as a weapon. *Id.* at 70:24-25, 71:1-4.

willing to do just about anything to do that." *Id.* at 210:25, 211:1-3.

The jury next heard from Mario Davila, Davila's father ("Mario"). Mario noted that he was currently incarcerated and serving a 20-year sentence for murder. *Id.* at 220:10-17. Mario fathered five children, three of whom also spent time in prison. *Id.* at 223-24. He testified that he met Davila's mother when he was working in her father's mechanics garage. *Id.* at 225:11-13. At that time, he was around the age of twenty-four and she was thirteen. *Id.* at 242:1-5, 230:12-14. Mario testified that he had a somewhat tumultuous relationship with Davila's mother, Sheila Olivas, which was caused by Mario's drinking problem. *Id.* at 242:12-23. Mario was sentenced to prison when Davila was very young, and as a result, the burden to raise and care for Davila was largely placed on his mother. *Id.*

Next, Emily Davila ("Emily"), Davila's sister testified. She noted that she and Davila were fathered by Mario Davila. Trial Tr. vol. 24 at 13:20-25, ECF No. 11-26. Although she had written to her father, she had never met him. *Id.* She further testified about her and Davila's poor relationship with their mother, Sheila Olivas. When Emily was thirteen, her mother advised her and Davila that they were the product of a rape. *Id.* at 23:18-20. When she was sixteen, Emily stated that her mother kicked her out of her home, forcing Emily to move in with her boyfriend and his family. *Id.* at 17:16-23. Davila was kicked out of the home when he was fifteen; he moved in with a girlfriend and her family. *Id.* at 25:7-10. Before they left the home, Emily

and Davila worked at a grocery store to help their mother pay the household bills. *Id.* at 27:1-2. Emily further related that she and her mother had previously been in physical fights requiring police intervention and resulting in Emily being put in jail. *Id.* at 30:17-25. In describing the environment in which she and Davila grew up, Emily testified that she would frequently hear gunshots and "would see all kinds of stuff on the ground. Condom wrappers here and there, needles here and there." *Id.* at 38:14-16.

The jury next heard from Sheila Olivas ("Olivas"), Davila's mother. She testified that she was taken out of school when she was ten-years-old. *Id.* at 51:23-25. She explained that, when she was thirteen, her father "placed" her with Mario Davila in exchange for Mario giving Olivas's father money. *Id.* at 53:16-23. She later conceived both Davila and Emily as a result of Mario sexually assaulting her. *Id.* at 54:11-15. Olivas received no prenatal care during her pregnancy with Davila. *Id.* at 57:2-6. Although she would often attempt to leave Mario as a result of his violent, alcoholic tendencies, Olivas's family would always "push" her back with him. *Id.* at 54:24-25, 55:1-8. Olivas additionally testified that as they were growing up, her children often witnessed bouts of domestic violence between Olivas and her romantic partners, some of which required police intervention. *Id.* at 66:16-18. Regarding Davila, Olivas testified that he was diagnosed with ADHD[5] when he was a child and had very poor

[5] The term ADHD was later defined as "attention deficit hyperactivity disorder." *Id.* at 213:1-4.

vision. *Id.* at 69:22-24. He additionally had a difficult time controlling his temper. *Id.* at 99:22-25. Although he was prescribed Ritalin for his ADHD, Olivas quit administering the medication to him because "[w]hen he took it, . . . he was like a zombie." *Id.* at 70:12-17. As a student, Davila "had good grades until high school." *Id.* at 71:1-2. When he was twelve or thirteen, Davila began wearing colored clothing suggesting that he was involved in gang activity. *Id.* at 71:14-25. Olivas often picked Davila up from school and he was "beat up." *Id.* at 82:14-15. His teachers additionally reported that Davila "was exhibiting behaviors that are unacceptable in the classroom, and at times [was] endangering the lives of other students in [the] classroom." *Id.* at 100:4-8.

Davila's aunt, Debra Jones, also testified. Jones stated that she was Olivas's younger sister. *Id.* at 113:12. Jones and her two other sisters assisted Olivas in raising and caring for Davila and Emily. *Id.* at 120:17-19. At the age of fourteen, Davila moved in with Jones. *Id.* at 122:9-10. Jones noted that there were "issues" because Davila was "wearing red."[6] *Id.* at 122:17-22. Olivas sent him to live with Jones because she thought that Jones would be able to help Davila. *Id.* Jones noted that she attempted to help Davila by requiring him to attend church every week, having him go the Boys & Girls Club, and discussing gang-related issues with him. *Id.* at 123:7-14. Angela Jones, another

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[6] Jones testified that because Davila constantly wore red clothing, she was concerned he was involved in gang-related activity. *Id.* at 122:23-25, 123:1-2.

of Davila's aunts, further testified that one of her six children (Davila's cousin) also was a gang member-only he was a member of the Crip gang. *Id.* at 142:6-9.

Dr. Fallis, the psychologist who was hired by defense counsel to prepare a social history on Davila, also testified. In conducting her investigation, Dr. Fallis spoke with Davila, Olivas, Mario, Emily, and his aunt, Debra Jones. *Id.* at 184:17-25, 185:1-5. She also spoke with "a former teacher who remembered him from middle school, Lisa Walker [and] . . . someone who runs . . . a program through the Boys and Girls Club of Fort Worth and some program to keep kids outs of gangs. His name is Melvin Carter. And two of his associates." *Id.* She additionally reviewed Davila's school, medical, and penitentiary records. *Id.* at 184:5-10, 186:8-12. Dr. Fallis first noted that although Olivas received no prenatal care, Davila's birth was "normal." *Id.* at 190:7-10. Developmentally, Davila reached the early milestones, such as potty training, walking, and talking, at normal points in time. *Id.* at 191:11-20. When Davila first began his schooling, however, he began exhibiting behavioral problems, which included "[h]itting other kids, hitting his teacher, throwing furniture, running away from the teacher, interrupting the teacher, being very fidgety, just could not sit still. Being silly in the classroom. Having difficulty following directions." *Id.* at 192:7-11. His behavior issues were so significant that the school threatened to expel him from the first grade. *Id.* at 192:12-13. Davila was later diagnosed with ADHD and was prescribed Ritalin. *Id.* at 193:20-24. Although Davila's teachers reported that there was

a "significant improvement in terms of not just his behavior, but also his academic performance" as a result of the Ritalin, Olivas decided to discontinue the treatment. *Id.* at 194:1-3, 213:9-12. Davila's records indicated that he had other behavioral issues in the fifth grade and was sent to an alternative school in the tenth grade. *Id.* at 195:1-5.

Davila was relatively uninvolved in any type of extracurricular activities – "no sports, no clubs, or other groups, apart from one brief period of playing soccer" – during his younger years. *Id.* at 195:1519. Because he was not involved in pro-social activities, Dr. Fallis noted that Davila was more vulnerable to developing problems later on in his life. *Id.* at 195:20-23.

At the age of seven, Davila was administered an IQ test in which he performed significantly below average. *Id.* at 198:24. He also had very poor vision and was not encouraged or made to wear his glasses, which impaired his schooling. *Id.* at 200:4-8. Despite the fact that Olivas reported that he made excellent grades through elementary, middle, and high school, Dr. Fallis noted that Davila's records proved otherwise. *Id.* at 199:10-13. Instead, Davila's school records from fifth grade and on established that he received low grades, and sometimes failed his core classes. *Id.* at 201-03. Additionally, he received several failing grades on his state-mandated tests. *Id.* at 204:18-22. Dr. Fallis found that Olivas, who had only received a third-grade education, did not place an emphasis on education in Davila's life. *Id.* at 197:5-8. In support, she noted that

Davila was frequently absent from school.[7] *Id.* at 201:15-16, 205:16-21.

With respect to the quality of his relationships, Dr. Fallis noted that she could not find information suggesting that Davila had many friendships. *Id.* at 218:1-3. As a teenager, Davila dated and lived with much older women. *Id.* at 217:19-25 (noting that at age 15, Davila dated a 28-year-old woman and a 32-year-old woman). He also joined the Blood gang as a young teenager. *Id.* at 218:1114. Davila had very limited contact with his father as a child, and had no physical contact with his father after the age of two, when his father went to prison. *Id.* at 223:13-18. Dr. Fallis further detailed the pattern of crime within Davila's family: "Mario has brothers, these would be [Davila's] uncles, who are also incarcerated. Mario has fathered other children. These would be [Davila's] half brothers. They are also incarcerated. There's a lot of conflict amongst the family members who are not incarcerated. A lot of arguing and fighting. And there's also a significant history of substance abuse amongst the paternal relatives." *Id.* 225:23-25, 226:1-5. Davila further has a history of "mental health problems, substance abuse problems and learning problems." *Id.* at 252:13-25.

Ultimately, Dr. Fallis stated that Davila was vulnerable to several risk factors he experienced during his development:

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[7] For example, Davila missed 20 days of school during his fifth grade year and 40 days of school during his ninth grade year. *Id.* at 201:15-16, 205:16-21.

I believe that the risk factors that are pertinent in-in his case are the-the genetic factors that have to do with developing ADHD, the limited intellectual abilities. Being raised by a teenage mother. Having a limited attachment to her because he was the product of a rape. Having been exposed to neglect from his mother. Exposed to domestic violence in the home. Not having a father in the home. Finding out that the father he identified as his-as his dad was actually not his father. Finding out that his biological father was someone who is in prison for a violent crime.

Not having the medication that assisted him in his schoolwork and his behavioral problems, the Ritalin continued. Not having a parent or a caretaker that pursued the academic assistance that he needed through school.

Another risk factor would be not involving him in prosocial activities in his early childhood, his later childhood, his adolescence. Getting exposed to gangs in the school system and the neighborhood. And when the – the red flags arose that suggested he was getting gang – interested in gangs that there was not some intervention then.

I think the – the generational problems, the ways that his own mother was treated and then how that affected her parenting of him was a risk factor. The growing up in a family that was in the lower socioeconomic strata was a risk factor. Being in a neighborhood that

> tends to be a high crime area was a risk factor. And being involved in a gang was a risk factor.

Trial Tr. vol. 25 at 20:10-25, 30:1-15, ECF No. 11-27.

During closing arguments, the State argued that Davila's violent history-including the armed robbery, murder, and capital murder all committed within one week and his later attempted escape from jail-supported a finding that he would be a future danger to society. *Id.* at 54:9-23. In response, defense counsel argued to the jury that their focus should be not on what Davila had done in the past, but instead on his capacity to change in the future. *Id.* at 58:22-25, 59:1-18. Trial counsel drew on testimony elicited during cross-examination of the State's gang expert that many experiences Davila had in his life such as ADHD, his poor family structure, his relationship with his mother, and socioeconomic status were risk factors for gang activity. *Id.* at 63:19-25. In addition, trial counsel referenced the State's expert's testimony that most gang members change and "mature" out of their behavior. *Id.* at 64:12-17.

With respect to the mitigation issue, trial counsel, although admitting that Davila made horrible choices in committing the crimes, focused on the choices Davila did not make: his teenage mother, his conception as a result of sexual assault, having a father who spent the majority of his life in prison, having no familial support from his grandparents, being raised in an environment that did not value education, growing up poor, and his lack of involvement in extracurricular activities. *Id.* at

67-70. Ultimately, trial counsel argued that Davila was "worth life" and deserved the opportunity to have time to change while in prison. *Id.* at 72-73.

4. *Mitigating Evidence Presented to State Habeas Court*

During the state writ proceedings, Davila hired mitigation expert Toni Knox to conduct a mitigation investigation to determine whether trial counsel found and presented adequate mitigation evidence through trial counsel's investigation. Am. Pet. 46, ECF No. 17. Knox testified about her findings at the state writ hearing and provided an affidavit. *Id.* at 47.

Knox noted that trial counsel failed to attempt to contact Davila's maternal step-grandmother, Rosa Jones Nash and Davila's aunt, Sandra Kay Vargas. State Habeas Clerk's R. (vol.1) 35, 38. Each of these individuals, however, refused to sign an affidavit. *Id.* at 146. In fact, when one of Knox's associates, James Hughes, went to meet with Nash and Vargas, he was met by males who "informed [him], in what [he] perceived to be a threatening way, that [he] needed to leave as the family did not want to get involved in [Davila's] case as they were fearful of some type of gang retaliation and just did not want to be involved." *Id.*

Ethel Fay Jones-Silverio, Davila's aunt, provided an affidavit. *Id.* at 155. She noted that Mario Davila was a "gangbanger" who would steal from his family and did illicit drugs. *Id.* Olivas met Mario when he

worked in her father's garage and pursued him. *Id.* Olivas would often sneak out of her home to meet Mario and stay with him overnight. *Id.* at 156. Prior to her relationship with Mario, and at the age of twelve, Olivas had been sexually active with a man who was thirty-years-old. *Id.* According to Jones-Silverio, Olivas's testimony that she was "sold" by her father to Mario Davila was untrue. *Id.* Olivas did not treat Davila and his sister Emily in the same manner in which she treated her other children-she treated them like "outcasts." *Id.* As punishment, Olivas would often make Davila and his sister Emily stand in a corner for hours at a time. *Id.* at 157. Jones-Silverio saw permanent stains on the walls where Davila had cried on the wall and marks where his forehead had been pressed against the wall. *Id.* Olivas would also force Davila and Emily to work in the home and care for their younger siblings, and she would also force them to work outside the home so that she could take their paychecks. *Id.* at 158-59. These same facts were further established in an affidavit obtained from Lynda Jones Mireles, Davila's cousin. *Id.* at 163 (noting she saw tear streaks on the wall where Davila and Emily were forced to stand as punishment for not cleaning the home).

Olivas's sister-in-law, Elizabeth Olivas, also provided an affidavit. She reiterated that Olivas treated Davila poorly and would often hit him as punishment. *Id.* at 168. She noted that she was "sorry that [she] was unable to speak with [Davila's] defense attorneys at the time of his trial because [she] would have explained the effects that [Olivas] had on him growing

up." *Id.* at 169. Additionally, she stated that she blamed Olivas for what happened to Davila. *Id.*

Finally, Emily Davila's boyfriend's mother, Lisa G. Wallace provided an affidavit. She noted that Olivas was very manipulative and would force Emily and Davila to give her their paychecks. *Id.* at 173. Davila lived in Wallace's home for a very short period of time after he got out of prison. *Id.* She noted that when Davila lived with her, he "abided by [her] rules and seemed to be doing well." *Id.*

C. Analysis (Claim 2)

The state trial court entered findings of fact and conclusions of law, which were adopted, in whole, by the CCA. *See* State Habeas Clerk's R. (vol.2) 331-345; *Ex Parte Davila*, 2013 WL 1655549, at *1. The Court reviews the findings of fact and conclusions of law under the standards set forth in 28 U.S.C. § 2254(d).

1. *Strickland Analysis-Prong 1*

Davila fails to establish his claim under the first *Strickland* prong. There are countless ways in which to effectively represent a capital defendant. *See Pinholster*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at 689). Here, the mitigation team consisted of two seasoned defense attorneys, an investigator, and a psychologist. Trial counsel also consulted with multiple doctors who advised them about gang membership and gang activity. State Habeas Rep. R. (vol.2) 37. Trial

counsel made the decision to utilize Dr. Fallis as the mitigation specialist before the jury. The ABA Guidelines-which are not binding upon this Court-allow for the use of psychologists as mitigation specialists. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.4, cmt. 1003 (2003) (noting that counsel is free to allocate duties imposed by the guidelines to appropriate members of the defense team, with two exceptions inapplicable in the instant case). Trial counsel was also able to use the State's expert, Dr. Sabir, to elicit helpful information to explain Davila's risks for gang involvement. Additionally, although Davila's Aunt Ethel Jones did provide an affidavit, she refused cooperate with trial counsel and did not want to testify at the time of trial. State Habeas Rep. R. (vol.2) 113-114. Keene also noted that both she and Ford talked with Lisa Wallace and sought her trial testimony, however, Wallace did not want to participate in the trial. *Id.* at 115. The Court finds that trial counsel's performance did not fall below a constitutionally acceptable level; thus, Davila's claim fails. *See Strickland*, 466 U.S. at 716. However, even if trial counsel's performance were deficient, Davila still cannot establish prejudice under prong two.

2. *Strickland Analysis-Prong 2*

Here, as the trial court appropriately found, most of the evidence set forth in Davila's habeas petition was cumulative of the evidence presented at trial. During the sentencing phase, the jury heard that Davila did not form a normal bond with Olivas, and that

Olivas treated Davila and his sister Emily in a neglectful and abusive manner. This was established through testimony regarding (1) Olivas being "sold" to Davila's father when she was thirteen and raising Davila and Emily without their father; (2) the role Davila and Emily had to pay [sic] in helping to financially support the family; (3) the bouts of physical violence between Emily and Olivas; (4) the fact that Olivas advised Davila and Emily at an early age that they were conceived through sexual assault; (5) the alcohol abuse and incarceration of Davila's father early in Davila's life; (6) Olivas kicking Emily and Davila out of the home when they were young teenagers; (7) Olivas failing to keep Davila properly medicated and not requiring him to wear his eyeglasses despite his poor vision; and (8) an extended family culture of crime and incarceration. To the extent new evidence from Olivas's relatives suggests that Olivas minimized her wrongdoing before the jury, the jury heard Dr. Fallis's testimony, which had the same effect. The jury was adequately informed of the abusive, neglectful, and manipulative environment in which Davila lived as a child. As a result, Davila failed to make the requisite showing that the additional mitigation evidence undermines confidence in the verdict. Courts must be "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir.2009).

Further, not all of the witnesses discovered through the state habeas investigation would have provided helpful testimony at trial. Two of the individuals whom Knox identified – Rosa Nash Jones and Sandra Kay Vargas – refused to provide an affidavit to Knox. In fact, when Knox's associate attempted to meet with Jones and Vargas to secure their affidavits, he was threatened by their male family members and told that Jones and Vargas would not provide an affidavit for fear of gang retaliation. Furthermore, Ethel Fay Jones-Silvero described Davila's gang activity when he lived in her home. She stated she came home to find red scarves hanging all over her apartment. She confronted Davila and his then live-in stripper girlfriend, stating that they could no longer stay with her because she feared retaliation from a rival gang.

In addition, whatever mitigating impact the additional information may have had on the jury would have been overwhelmed by the State's aggravating evidence. The jury learned that Davila posed a security threat to detention officers on several occasions when he was incarcerated. In fact, while he was incarcerated in the time leading up to trial, he and three other inmates attempted to escape from jail by brutally beating two guards and a maintenance worker. Each of the guards spent a considerable amount of time off of work as a result of the injuries they sustained in the attack. Additionally, the jury learned of Davila's violent criminal history including an instance where he and two of his cohorts robbed two individuals at gun point in the week prior to the capital murder. Other witnesses also

testified about the cold-blooded murder of Darrell Ford committed only days prior to the instant capital murder. One witness noted the dead look in Davila's eyes after he shot and killed Ford.

The minimal impact the additional mitigating evidence may have had on the jury would have also been overshadowed by the brutal facts of the murder. *See Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir.1999). Brandishing a high-powered SKS semiautomatic weapon, Davila opened fire into a group of several women and fifteen children who were celebrating a child's birthday party. Davila shot and killed a grandmother and a five-year-old girl. He injured three other children and an adult, who, through no act of Davila's, managed to survive. Comparing the mitigating and aggravating evidence, the Court finds that there is no "reasonable probability that, absent the error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sonnier v. Quarterman*, 476 F.3d 349, 356-57 (5th Cir.2007) (citing *Strickland*, 466 U.S. at 695).

Defense counsel's closing argument to the jury revolved around Davila's capacity to change for the better. However, further evidence of how bad Davila's childhood was may have only cemented in the jury's mind his inability to change and would have run counter to the chosen defense theory. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir.2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1244, 185 L.Ed.2d 190 (2013) (concluding counsel's decision not to offer evidence of a defendant's

troubled, impoverished, and disadvantaged background was reasonable because the evidence could suggest he was a product of his environment and therefore likely to be dangerous in the future). Further, the facts that Emily was raised under the same circumstances as Davila and yet managed to live her life differently, would dilute the mitigating impact of any additional "difficult-childhood" evidence. *Guevara v. Stephens*, No. 13-7003, 2014 WL 3894303, at *5 (5th Cir.2014) (holding that any information about Guevara's difficult life in El Salvador would have been undermined by, among other things, his brother's clean record despite their shared childhood).

In sum, considering all of this evidence in its totality, the Court's confidence in the verdict is not undermined. *Cf. Wiggins*, 539 U.S. at 535 (reciting "powerful" overlooked mitigation evidence of severe privation and abuse while in care of an alcoholic, absentee mother; physical torment, sexual molestation, and repeated rape while in foster care; periods of homelessness; and diminished mental capacities); *Escamilla v. Stephens*, No. 12-70029, 2015 WL 680405, at *5 (5th Cir.2015) (affirming denial of ineffective assistance of counsel claim after finding no prejudice in case where no mitigation investigator was hired). The Court finds that the CCA's determination did not result in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; nor did it result in a decision based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2). Claim Three is denied. *See id.*

D. State Habeas Counsel's Performance (Claim 4)

In Claim Four, Davila argues that state habeas counsel was ineffective during the state habeas proceedings by failing to properly litigate the ineffective assistance of trial counsel claim. Am. Pet. 91-102, ECF No. 17. Specifically, he states that counsel was "ineffective for failing to subpoena any of the witnesses (other than Toni Knox) to testify at the state writ hearing," and was "further ineffective for failing to gain anything more than a passing familiarity with the facts, hoping instead to 'wing it' by parroting Ms. Knox's report." *Id.* at 91-92. He appears to assert that, under *Martinez v. Ryan*, state habeas counsel's ineffectiveness precludes AEDPA deference and, perhaps, allows this Court to consider new evidence not presented in state court.[8] *See Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

The ineffective assistance of trial counsel claim was previously adjudicated on the merits in state court. The "new" evidence presented to this Court in the form of an additional affidavit from Toni Knox does not render the claim unexhausted. *Ward v. Stephens*, 777 F.3d 250, 258 (5th Cir.2015). Because the claim is exhausted, there is no procedural bar asserted, and

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[8] To the extent Davila may be asserting the ineffective assistance of state habeas counsel as a substantive claim for relief, it is barred by Section 2254(i). 28 U.S.C. § 2254(i) (providing that the ineffectiveness or incompetence of counsel during state collateral post-conviction proceedings shall not be a ground for relief).

Martinez does not apply. *Brown*, 684 F.3d at 489 & n. 4. Moreover, the Court's review of the state court decision must be based only on the evidence that was before the state court. *Pinholster*, 131 S.Ct. at 1398. For the reasons previously discussed, the Court finds that the state court's rejection of the ineffective assistance of trial counsel claim was not unreasonable. *See supra* Part IV.C. The Court denies Claim Four.

V. ASSISTANCE OF APPELLATE COUNSEL (CLAIMS 3 & 4)

Through appellate counsel Mary Thornton ("Thornton"), Davila filed a direct appeal with the CCA. In the appeal, Davila raised fourteen points of error. After reviewing the merits of Davila's claims, the CCA affirmed Davila's conviction and sentence in an unpublished, unanimous opinion. *Davila v. State*, No. AP-76,105, 2011 WL 303265 (Tex.Crim.App. Oct.3, 2011).

In Claim Three, Davila now contends that Thornton failed to recognize and raise the claim that Davila was convicted through the use of an improper jury instruction. Am. Pet. 81-90, ECF No. 17. Respondent argues that the claim against Thornton is unexhausted, procedurally defaulted, and meritless because the jury instruction was proper. Davila asserts that any default may be excused because appellate counsel and state habeas counsel were both ineffective. *Id.* at 89-92, 97.

A. Procedural Bar

Generally, a federal court will not review the merits of a claim that a state court declined to hear as a result of the petitioner's failure to abide by state procedural rules. *Martinez*, 132 S.Ct. at 1316. This general rule is "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Id.* An exception exists to the general rule, however, if the petitioner can establish a showing of cause and prejudice. *Id.*

Here, Davila claims that the exception set forth in *Trevino*, ___U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044, excuses his procedural default of the ineffective assistance claim against Thornton. *See* Am. Pet. 89-92, ECF No. 17. The Court previously determined that Davila's third claim appeared to be unexhausted and procedurally barred under *Coleman v. Thompson* because Texas's subsequent writ bar would prevent him from presenting the claim now in state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Mem. Op. & Order, Nov. 10, 2014, ECF No. 35. The Court also rejected his assertion that *Trevino* has been extended to excuse the default of claims against appellate counsel. *See Reed v. Stephens*, 739 F.3d 753, 778 n. 16 (5th Cir.2014). Finally, the Court held that ineffective assistance of appellate counsel cannot excuse the procedural default of a claim against said appellate counsel for the simple reason that such claims do not exist to be raised on appeal.

They are logically raised, as Davila asserts, in state habeas proceedings.

Thus, the ineffective assistance claim against Thornton is barred, and *Trevino* does not provide an avenue for excusing the procedural default. Assuming, however, that Davila can avoid procedural default, the claim against Thornton is denied on the merits for the reasons discussed below. *See* 28 U.S.C. § 2254(b)(2) (stating that habeas relief may be denied on the merits, notwithstanding petitioner's failure to exhaust).

B. Appellate Counsel's Representation

Davila argues that Thornton was ineffective because she failed to challenge an improper statement of law given in response to the jury's question about transferred intent.

1. *The Instructions*

At trial, the jury was given the following instructions regarding capital murder:

> A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.
>
> . . .
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it

> is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> . . .
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm; and both murders were committed during the same criminal transaction, then you'll find the Defendant guilty of the offense of capital murder.

Trial Tr. vol. 20 (Court's Charge) at 5-8, ECF No. 11-22. During their deliberations, the jury sent a note to the trial court and asked the following:

> We need a clarification of the capital murder charge. In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

Clerk's R. vol. 9 (Jury Note 2) 1931, ECF No. 10-44. The trial court responded first with the following supplemental instructions:

> MEMBERS OF THE JURY:
>
> With regard to the charge of capital murder, the definitions of "intentionally" and "knowingly" on page 1 define the mental states referred to in the application paragraph on the top of page 2. These portions are repeated below:
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

Clerk's R. vol. 9 (Resp. Note 2) 1932, ECF No. 10-44. The trial court also sent a second supplemental response to the jury (of which Davila now complains). It read:

The Court gives the additional charge on the law as follows:

> "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected."

Id. at 1933. Trial counsel objected to the second supplemental charge and asked the trial court to instead "send the original response the Court had regarding intentionally and knowingly . . . [a]nd wait . . . until the jury indicates they can't reach . . . a resolution. And then at that point, submit the other special charge, if it's called for." Trial Tr. vol. 20 at 53, ECF No. 11-22. The trial court overruled the objection and sent the instruction to the jury. *Id.*

2. *Analysis*

In reviewing an ineffective assistance of appellate counsel claim, a court must determine (1) whether appellate counsel's performance was deficient, and (2) whether appellate counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish deficient performance, a petitioner must show that "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). To show prejudice, the petitioner must establish "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* "Counsel need not raise every nonfrivolous ground of appeal, but should instead present '[s]olid, meritorious arguments based on directly controlling precedent.'" *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir.2003) (citing *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir.1999)).

Davila argues that the trial court's second supplemental charge "contained an incorrect statement of the law because it failed to recognize that in Texas one must have the specific intent to murder at least two people to be guilty of capital murder; it is not enough that a person attempted to murder a single person, and accidentally killed two." Am. Pet. 82-83, ECF No. 17. Davila asserts Thornton was ineffective for failing to raise this issue on direct appeal.

The language given in the trial court's second supplemental instruction is taken from section 6.04 of the Texas Penal Code, which reads "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." Tex. Penal Code Ann. § 6.04 (West 2013). Trial counsel objected to this instruction on the basis that the trial court should delay the charge until after the jury deliberated further, not on the basis that the instruction was an incorrect statement of law.

Respondent argues that this failure to object waived any error for appeal and that Thornton cannot be ineffective for failing to raise a claim that was not preserved for appeal in the first instance. Resp. 61, ECF No. 29. Davila argues that trial counsel's failure to object does not preclude appellate review of jury charge error, but only increases the degree of harm necessary for reversal. Am. Pet., 85. Specifically, Davila argues that, under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1985), jury charge error that is not preserved requires "egregious harm" for reversal, as opposed to a "some harm" standard when the error is preserved. As explained below, the Court finds no error in the charge and that any alleged error did not result in harm under either *Almanza* standard.

A Texas trial court may instruct the jury on the law of transferred intent as applied in a capital murder prosecution. *See Roberts v. State*, 273 S.W.3d 322, 331 (Tex.Crim.App.2008). Davila argues that the second

supplemental instruction in this case was erroneous only because it violated the rule in *Roberts* that a defendant convicted of multiple-murder capital murder must have the necessary mental state (intent or knowledge) with respect to the number of victims killed. To ascertain whether the jury instruction was error, the Court examines the "charge as a whole instead of a series of isolated and unrelated statements." *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App.1995). The "transferred intent" instruction was not given to the jury in isolation; it was given to the jury along with the language taken from the court's charge that repeated the statutory definitions for "intentionally" and "knowingly" as well as the application paragraph for capital murder. Clerk's R. vol. 9, 1932-33, ECF No. 10-44. In Texas, the application paragraph is the portion of the charge that authorizes conviction. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex.Crim.App.2013). The application paragraph for capital murder clearly required that the jury find Davila caused two intentional or knowing deaths in the same criminal transaction. In the event the jury found that Davila killed only one person, the application paragraph did not allow the jury to convict Davila of capital murder. Thus, the jury charge, taken as a whole, does not violate the rule in *Roberts*.

More to the point, the CCA specifically distinguished the facts of this case from *Roberts*, where the victim was a woman who, unknown to the defendant, was pregnant. The CCA noted that, in contrast, Davila intended to kill "the fat dude in the middle of the

street" and three "guys on the porch," or, in other words, "four males, not two females." *Davila*, 2011 WL 303265, at *4. Any error in the charge was, therefore, harmless, because *Roberts* is not implicated: Davila intended to kill more people than he actually did.

Given the foregoing, the record does not show that Thornton unreasonably failed to discover a non-frivolous issue for appeal and does not show that the issue would have prevailed on direct appeal. Claim Three and Four are denied.

VI. FOURTH & FOURTEENTH AMENDMENTS-ADMISSION OF WRITTEN STATEMENTS (CLAIMS 5 & 6)

Davila next contends that the trial court erroneously admitted three of his written statements admitting to the commission of the capital murder offense and another of his statements admitting to the commission of an extraneous murder offense. Am. Pet. 103, ECF No. 17. Davila contends that the admission of these statements was erroneous under the standard set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and against his rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* In response, Respondent argues that this Court is prevented from reviewing such alleged error under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), because Davila had a "full and fair opportunity to litigate his Fourth Amendment claim [in state proceedings] and

exercised the opportunity to do so." Resp. 68-69, ECF No. 29. In reply, Davila contends that *Stone* does not apply. Reply 26-31, ECF No. 33.

A. Applicable Law

In *Stone v. Powell*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Davila argues that the Supreme Court's holding in *Stone* does not apply in capital cases, and that the Supreme Court has exclusively applied the rule in non-capital cases. Reply 27, ECF No. 33. However, the Fifth Circuit has applied *Stone* to capital cases involving the death penalty and determined that it was prevented from reviewing a petitioner's Fourth Amendment claim as a result. *See ShisInday v. Quarterman*, 511 F.3d 514, 524-25 (5th Cir.2007) ("The Fifth Circuit applies the [*Stone*] bar as long as the state gives the defendant an opportunity to litigate the issue, whether or not the defendant takes advantage of the opportunity.") (citing *Janecka v. Cockrell*, 301 F.3d 316, 320-21 (5th Cir.2002)); *Busby v. Dretke*, 359 F.3d 708, 722 (5th Cir.2004) (noting Fourth Amendment claims are not cognizable in federal habeas corpus proceedings pursuant to *Stone*); *Jones v. Johnson*, 171 F.3d 270, 278 (5th Cir.1999) ("The state provided an opportunity for full and fair litigation of [petitioner's] fourth

amendment claim prior to trial; we cannot reexamine this claim on federal *habeas* review."). The Court now turns to a review of the state court proceedings to determine whether Davila received a full and fair opportunity to litigate the Fourth Amendment issues of which he now complains.

B. Analysis

The Supreme Court in *Franks v. Delaware* held that a defendant may challenge an affidavit supporting a search warrant on Fourth Amendment grounds if the defendant establishes that (1) misrepresentations within the affidavit are the product of "deliberate falsehood or deliberate disregard for the truth," and (2) that the statements were necessary to establish probable cause. 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Here, during the state court proceedings, Davila moved to suppress "any and all oral and written statements of the Defendant in this cause, which were made to agents of the State." Clerk's R. vol. 1 (Mot. Suppress Statements), ECF No. 10-3. Davila further moved to suppress "the arrest warrant in this cause based on the affiant's knowing or intentional false statements or based on the affiant's disregard for the truth in making false statements." Clerk's R. vol. 9 (Mot. Suppress Arrest Warrant), ECF No. 10-44 (emphasis removed). The state trial court held a hearing and heard evidence regarding the validity of the arrest warrant and the voluntariness of the statements Davila gave while in custody. Trial Tr. vol. 16 at 170-288, ECF No. 11-18. The state trial court overruled

each of Davila's motions regarding the validity of the arrest warrant and the voluntariness of his statements. *Id.* at 244:19-21, 299:2-6. Later during his trial, Davila again objected to the validity of his arrest warrant. *Id.* at 37:9-16. The state court provided an alternative basis for its original ruling denying Davila's motion to suppress. *Id.* at 37:20-25, 38:1-20. The issue was then submitted to the jury. The jury was instructed that, if they had a reasonable doubt about whether the affidavit for arrest contained sufficient probable cause to support Davila's arrest, they could not consider the arrest or any evidence derived from it. Clerk's R. vol. 9, 1923-24, ECF No. 10-44. The trial court's ruling was affirmed on appeal.

Because Davila was afforded a full and fair opportunity to litigate the Fourth Amendment issue, and did in fact litigate the issue, the Court finds that *Stone* applies to bar this Court's review of the issue in the instant federal habeas proceedings. *Stone*, 428 U.S. at 494. As a result, the Court denies Claims Five and Six. *See id.*

VII. FIFTH, SIXTH, & FOURTEENTH AMENDMENTS-ADMISSION OF WRITTEN STATEMENTS (CLAIMS 7 & 8)

Davila next contends that the trial court erroneously admitted all four of his written statements because they were made involuntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments. Am. Pet. 111, ECF No. 17. He argues that the statements were

not given voluntarily because, as he was interrogated for seven hours, he did not have anything to eat or drink and did not use the restroom. *Id.* at 114-115. Respondent maintains that the statements were not coerced and were instead offered voluntarily. Resp. 76, ECF No. 29. Alternatively, Respondent states that even if the statements were obtained in violation of Davila's Fifth Amendment rights, "the Court must still deny relief because the admission did not have a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 77. This claim was raised and rejected on direct appeal; thus, AEDPA deference applies.

A. Applicable Law

In determining the voluntariness of a confession under the Fifth Amendment, a reviewing court applies the "totality of the circumstances" approach. *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir.2009). That is, the court considers "the suspect's age, experience, education, background, intelligence, and whether the suspect has the capacity to understand the warnings given to him, the nature of his rights, and the consequences of waiver." *Id.* The court further considers "[t]he circumstances of the interrogation, such as its length, location, and continuity." *Id.* "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.* The Supreme Court has opined that "cases in which a defendant can make a

colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n. 20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

"The voluntariness of a confession is ultimately a legal determination . . . [that] may also involve subsidiary factual determinations and mixed issues of law and fact." *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir.1998). As a result, this Court will defer to the state court's determination of voluntariness as long as it was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*; 28 U.S.C. § 2254(d)(1).

B. The Interrogation

In its analysis, the CCA set forth the following facts surrounding Davila's written confessions:

> Detective Johnson testified that [Davila] was arrested and brought to the police station at about 1:40 p.m. on April 8th. Detectives Johnson and Boetcher met with him in an interview room where [Davila's] handcuffs were removed and he was placed in leg cuffs. He began the interview by asking [Davila] if he wanted "anything to eat or drink or anything like that. He said no. I do it that way every time. And then I advised him of his Miranda rights." [Davila] told Detective Johnson that he understood his rights and that "he freely,

intelligently and voluntarily waive[d] those rights" and agreed to talk with the officers. "He was very relaxed. Just sat there kind of casual." [Davila] gave his first statement beginning at 4:00 p.m. and ended it at 4:25. He gave the second statement beginning at 6:47 p.m. and completed it at 7:22. The officers began taking the third statement at 7:38 p.m. and concluded it at 8:12. Detective Johnson said that he did not do anything to deny [Davila] his basic needs, did not prevent him from having liquids or food, and did not prevent him from going to the restroom. He took a picture of [Davila] lounging casually in his chair in the interview room. [Davila] does not appear to be under any stress or duress.

On cross-examination, Detective Johnson again said that [Davila] appeared very relaxed; "[t]he whole thing was extremely friendly." [Davila] "never asked to go to the bathroom"; he never asked for fluids or food. Detective Johnson reiterated that he had offered, but [Davila] turned him down.

Detective Boetcher also testified and said that [Davila] gave his fourth statement beginning at 8:45 p.m. and completed it at 9:06. He said that [Davila] had used the restroom, but he did not specify when.

The trial judge entered oral findings into the record and stated, inter alia,

> [Davila] was offered nothing in exchange for these three statements. There was no force, threats, or coercion made by the

> police. He was lucid. Did not appear intoxicated. Never asked for a-food or for anything to drink.
>
> The court finds that the statements are freely and voluntarily made and are admissible.

Davila, 2011 WL 303265, at *7-8.

C. Analysis

Here, both state courts determined that Davila's confession was made voluntarily and knowingly without threats or coercion. The Court defers to those determinations unless Davila can prove otherwise by clear and convincing evidence. In his briefing, Davila again argues that because he was questioned for seven hours and "did not ask to use the restroom and was not given anything to eat or drink" his confession was involuntary. Am. Pet. 113, ECF No. 17. He fails, however, to establish how those facts demonstrate the involuntariness of his confession or offer any additional evidence of coercive or improper activity. Davila simply asks this Court to disagree with the state court's ruling by rearguing the issues. The state trial court determined that Davila was offered nothing in exchange for the first three statements he gave; that the police did not force, threaten, or coerce Davila's confessions; that he was lucid and did not appear intoxicated; and that he never asked for food or anything to drink. Trial Tr. vol. 16 at 302:22-25, 303:1-3, ECF No. 11-18. Regarding the fourth statement, the state trial court found that

Davila "[a]gain during that period of time, . . . requested nothing" and that the statement was given freely and voluntarily. *Id.* at 303:12-13, 16-18. A state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Because Davila has failed to establish that the state court unreasonably rejected his claim that police coercion rendered his confession involuntary, Claims Seven and Eight are denied. *See* 28 U.S.C. § 2254; *Shisinday v. Quarterman*, No. H-06-814, 2007 WL 776680, at *23 (S.D.Tex.2007).

VIII. CONSTITUTIONALITY OF TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.071 (CLAIM 9)

Davila contends that the trial court erred by denying Davila's motion to preclude the death penalty as a sentencing option and declare Texas Code of Criminal Procedure Article 37.071 unconstitutional. Am. Pet. 116, ECF No. 17. Specifically, he argues that Article 37.071 is unconstitutional because it "allows for a death sentence without grand jury review of the punishment special issues in violation of the Fifth and Fourteenth Amendments." *Id.* In response, Respondent states that the Constitution does not require Texas's special sentencing issues to be presented in the indictment before the grand jury. Resp. 77, ECF No. 29. The state court rejected this claim on the merits on direct appeal.

A. Analysis

The Fifth Amendment to the United States Constitution provides, in relevant part, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. Const. amend. V. In *United States v. Robinson*, the Fifth Circuit held that, with respect to federal cases, "the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so . . . is constitutional error." 367 F.3d 278, 284 (5th Cir.2004).

Davila argues that the *Robinson* holding extends to state-court prosecutions and requires that the aggravating and mitigating factors that a jury must consider in the sentencing phase of trial must be alleged in the indictment. Am. Pet. 117-18, ECF No. 17. Davila further asserts that "[r]elying on the Supreme Court's decision in *Ring v. Arizona*, the court in *Robinson* held that the Fifth Amendment demands that aggravating factors that render a defendant eligible for the death penalty are, in fact, elements of the offense," thus, "the government is required to charge, by indictment, those statutory aggravating factors." *Id.* at 116-17. In turn, Respondent contends that the *Robinson* holding only applies to federal-court prosecutions. Resp. 78, ECF No. 29. Further, "[t]he special issues addressed at the punishment phase have nothing to do with the eligibility determination [to receive the death penalty], but instead are designed to narrow the jury's discretion in

making the ultimate decision whether to impose a death sentence." *Id.* at 80.

As the CCA correctly stated, the Fifth Amendment right to an indictment in felony cases has yet to be extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). The Fifth Circuit has additionally noted that "in *Robinson*, [the court] addressed only the requirement of a grand jury indictment in a federal prosecution." *Kerr v. Thaler*, 384 F. App'x 400, 403 (5th Cir.2010). Neither the Fifth Circuit nor the Supreme Court has extended the requirement to the states. *Id.*

Further, in Texas, the eligibility determination regarding the death penalty is made at the guilt phase of trial according to the elements that were alleged in the indictment. *See Lowenfield v. Phelps*, 484 U.S. 231, 245-46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Texas Penal Code Section 19.03 sets forth the elements to establish capital murder, which are the aggravating factors that could render an individual eligible for the death penalty. The special issues addressed during the punishment phase of trial do not apply to the eligibility determination, but rather apply to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence. *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) ("By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury

will have adequate guidance to enable it to perform its sentencing function."). As such, special issues are not an element of the offense that must be included in the indictment. *Granados v. Quarterman*, 455 F.3d 529, 536-37 (5th Cir.2006); *Rowell v. Dretke*, 398 F.3d 370 (5th Cir.2005); *Anderson v. Quarterman*, 204 F. App'x 402, 409 (5th Cir.2006). For these reasons, the Court finds that the CCA's determination was not an unreasonable application of Supreme Court precedent and this claim is denied on the merits. *See* 28 U.S.C. § 2254(d).

IX. CONSTITUTIONALITY OF TEXAS'S "10-12"[9] RULE (CLAIM 10)

Davila next argues that the trial court erred by overruling his objection to the constitutionality of Texas's "10-12 Rule." Am. Pet. 130, ECF No. 17. Specifically, Davila maintains that Texas's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments. *Id.* In response, Respondent contends that Davila fails to demonstrate that the CCA's determination resulted in an unreasonable application of clearly established Supreme Court precedent. Resp. 81, ECF No. 29.

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[9] The "10-12" Rule, as used in the parties' briefing and throughout this Order, refers to Article 37.071, § 2(f)(2) of the Texas Code of Criminal Procedure.

A. Applicable Law

Article 37.071 of the Texas Code of Criminal Procedure provides, in relevant part:

> (e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:
>
> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.
>
> . . .
>
> (f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:
>
> (1) shall answer the issue "yes" or "no";
>
> (2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree

Tex.Code Crim. P. art. 37.071 § 2(e)-(f).

B. Risk of Arbitrariness – Eighth & Fourteenth Amendments

Davila first argues that "[t]he 10-12 Rule affirmatively creates confusion in the minds of the jurors" because they "are first told that the jury as a whole 'shall' answer 'yes' or 'no' to each issue presented" then they "are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another." Am. Pet. 132, ECF No. 17. The statute provides, however, that the jury's inability to answer a special issue shall result in a life sentence. Tex.Code Crim. P. art. 37.071, § 2(g). And, section 2(a)(1) prohibits the court or counsel from informing the jury of the effect of a failure to agree on the special issues submitted. Tex.Code Crim. P. art. 37.071, § 2(a)(1). As a result, jurors are not informed that a single juror could prevent the imposition of the death penalty, which is in violation of his Eighth and Fourteenth Amendment rights. *Id.*

The Supreme Court has rejected this argument in *Jones v. United States.* 527 U.S. 373, 381-83, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) ("In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case."). In *Jones*, the Court held that a jury need not be told what happens procedurally when a verdict cannot be reached. *Id.* Although the jury cannot be "affirmatively misled regarding its role in the sentencing process," a court is not required

to instruct the jury "as to the consequences of a breakdown in the deliberative process." *Id.* at 381-82. The instruction in Davila's case accurately recited the governing law. This sub-claim is denied on the merits. 28 U.S.C. § 2254(d).

C. Right to Individualized Sentencing-Eighth Amendment

Davila next contends that he was denied his Eighth Amendment right to individualized sentencing because the 10-12 Rule misleads jurors regarding their individual ability to give effect to their belief on mitigating circumstances. Am. Pet. 140-44, ECF No. 17. Specifically, "[b]y instructing the jury that ten jurors are required in order to give a 'yes' answer, the Texas statutes . . . prevent individual jurors from having a meaningful opportunity to consider mitigating factors." *Id.* at 144. In support, Davila cites to *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1998). In *Mills*, the Supreme Court determined that the jury instructions violated the Eighth Amendment because they may have prevented the jury from considering mitigating evidence unless the jurors unanimously agreed that a particular circumstance was supported by the evidence. *Id.* at 384. The Supreme Court has since explained that "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 422-43, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Further, the Fifth Circuit has

determined that *Mills* is not applicable to the capital sentencing scheme in Texas. *See Druery v. Thaler*, 647 F.3d 535, 542-43 (5th Cir.2011) (noting that the Fifth Circuit has refused to invalidate the Texas sentencing scheme based on the *Mills* decision); *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir.2000); *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir.1994) ("Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, *Mills* is inapplicable."). As a result, the Court denies this sub-claim on the merits. *See* 28 U.S.C. § 2254(d).

D. Right to Fair and Impartial Jury – Sixth Amendment

Finally, Davila argues that the 10-12 Rule "forces the jury to wonder what would happen were they . . . unable to answer the special issues, possibly leads them to believe that an unacceptable third alternative other than life and death would follow, and then leaves them to draw upon their own preconceived notions in coming to a verdict." Am. Pet. 146, ECF No. 17. Davila appears to extend the arguments advanced with respect to the Eighth Amendment to the instant argument. Davila fails to offer any new case law or arguments apart from those that he previously offered. The Court previously found that Davila's arguments under the Eighth Amendment were without merit. *See* Part IX.C. Consequently, Davila has failed to carry his burden under 28 U.S.C. § 2254(d), and Claim Ten is denied.

X. JURY INSTRUCTION – BURDEN OF PROOF ON MITIGATION SPECIAL ISSUE (CLAIM 11)

Davila argues that the trial court erred by denying his motion seeking to instruct the jury regarding the burden of proof on the mitigation special issue. Am. Pet. 148, ECF No. 17. Davila contends that the court should have instructed the jury that the burden regarding the mitigation issue lies with the State. *Id.* In response, Respondent maintains that there is no constitutional requirement for the State to prove an absence of mitigating evidence. Resp. 85, ECF No. 29.

A. Applicable Law

Under Texas law, once a defendant is found guilty of capital murder, the jury is tasked with answering two special issues to determine whether the defendant will receive the death penalty. Specifically, the jury must answer the special issues unanimously to impose a death sentence. Tex.Code Crim. Proc. Ann. art. 37.071 § 2. The first of the two special issues requires the jury to assess the future dangerousness of the defendant. *Id.* § 2(b). The State must prove this issue beyond a reasonable doubt. *Id.* § 2(c). After answering the first special issue, the jury then addresses the issue of mitigation. *Id.* § 2(e)(1). The mitigation issue assigns no burden of proof. *Id.*

B. Analysis

Davila states that "[b]ecause [a negative answer to] the mitigation issue in the Code of Criminal Procedure Art. 37.071 § 2 (Special Issue Number Two) increases the maximum penalty for the crime of capital murder, Texas' statutory scheme is unconstitutional for not requiring this issue to be submitted, proved, and found by the jury beyond a reasonable doubt." Am. Pet. 149, ECF No. 17. The Fifth Circuit has addressed this issue and determined that "no Supreme Court or Circuit precedent requires mitigation to be proved beyond a reasonable doubt." *Kerr*, 384 F. App'x at 403; *Rowell*, 398 F.3d at 378. As a result, this claim is denied on the merits.

XI. REQUEST FOR HEARING

This Court previously denied without prejudice Davila's request for a hearing on Claims 2, 3 and 4 and stated that it would *sua sponte* consider whether a hearing is appropriate after a more thorough evaluation under the AEDPA. This Court has discretion to grant an evidentiary hearing if one is not barred under § 2254(e)(2). *Landrigan*, 550 U.S. at 473. In exercising that discretion, the Court considers whether a hearing could enable Davila to prove the petition's factual allegations which, if true, would entitle him to relief. *Landrigan*, 550 U.S. at 474. The Court also must consider the deferential standards in § 2254(d), which limit the Court's ability to grant habeas relief. *Id.* In practical effect, if the state-court record precludes habeas relief

under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing. *Id.*; *Pinholster*, 131 S.Ct. at 1399.

Claim 2 was adjudicated on the merits and the state court's ruling was determined to be reasonable. 28 U.S.C. § 2254(d). Claim 3 is procedurally barred, with no available avenue excusing the default, and Davila fails to allege any facts that, if true, would entitle him to relief on that claim. Davila also failed to demonstrate that the ineffective assistance of state habeas counsel alleged in Claim 4 is relevant to the procedural or substantive viability of Claims 2 and 3. Habeas relief is therefore precluded by § 2254(d) and § 2254(b), rendering a hearing on these claims inappropriate. *See Pinholster*, 131 S.Ct. at 1400-01; *Reed*, 739 F.3d at 778 n. 16.

XII. CONCLUSION

Based on the foregoing, the Court **DENIES** Davila's petition for a writ of habeas corpus. In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Davila a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); 28 U.S.C. § 2253(c)(2). If Davila files a notice of appeal, he

may proceed in forma pauperis on appeal. 18 U.S.C. § 3006A(7).

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERICK DANIEL DAVILA, **Petitioner,**	§	
v.	§	**Civil Action No. 4:13-cv-506-O (death-penalty case)**
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.	§	

FINAL JUDGMENT

(Filed Apr. 21, 2015)

By separate order of this same date, the Court has denied Erick Daniel Davila's Amended Petition for Writ of Habeas Corpus. It is therefore **ORDERED, ADJUDGED, and DECREED** that the claims in the petition are **dismissed with prejudice**. All relief not expressly granted is **DENIED**. This is a final judgment.

SO ORDERED on this **21st day** of **April, 2015**.

2016 WL 3171870
Only the Westlaw citation
is currently available.
This case was not selected for publication in West's
Federal Reporter. See Fed. Rule of Appellate
Procedure 32.1 generally governing citation of judicial
decisions issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5
United States Court of Appeals,
Fifth Circuit.

Erick Daniel Davila,
Petitioner-Appellant
v.
Lorie Davis, Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee.

No. 15-70013
|
FILED May 26, 2016
|
REVISED May 31, 2016

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:13-CV-506

Attorneys and Law Firms

Seth Kretzer, Law Offices of Seth Kretzer, Jonathan David Landers, Houston, TX, for Petitioner-Appellant.

Katherine D. Hayes, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX, for Respondent-Appellee.

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

Opinion

PER CURIAM:*

Erick Daniel Davila was convicted of capital murder and sentenced to death. After pursuing relief in state court, he brought a Section 2254 action. The district court denied relief. He now seeks a certificate of appealability ("COA") from this court. We deny him a COA.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2009, a Texas jury found Davila guilty of capital murder. Davila had opened fire with a semi-automatic assault rifle on a birthday party at a home in Fort Worth, Texas, killing Annette Stevenson and her five-year-old granddaughter, Queshawn Stevenson. The birthday party was for another of Annette's granddaughters. All the guests were children or adult women, except for Jerry Stevenson, Queshawn's father.

Around 8:00 p.m., many guests were on the porch when a black Mazda passed by the house slowly, driven by a man with a gun. A few minutes later, Cashmonae

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Stevenson, an 11-year-old at the party, saw a man run in front of the house across the street and begin shooting at the guests on the porch. Panic ensued as the guests tried to get inside the house. Multiple children, including Cashmonae, and adult guests were shot and injured. Annette and Queshawn were the only ones to die from their injuries.

A police investigation led to the arrest of Davila, who gave four written statements over the course of seven hours in custody after his arrest. Davila was a member of the Bloods gang. Davila's third statement included admissions that he and his friend had been driving around in his girlfriend's black Mazda and decided to have a "shoot em up." He said that he was trying to shoot "the guys on the porch and . . . trying to get the fat dude." He stated he did not know the name of the "fat dude," but recognized him.[1] As for the "guys on the porch," Davila appeared to have mistaken some adult women at the party for men because the only male at the party was Jerry. This confession, along with other evidence, was presented at Davila's trial and led to his conviction.

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[1] Jerry Stevenson testified that neither he nor anyone who lived at Annette Stevenson's house was associated with the rival Crips gang, although he had friends who were Crips. A few weeks before this shooting, Stevenson had intervened in an argument that occurred in front of Annette's house between some of his family members and members of the Bloods gang. A security guard who witnessed the argument testified that Davila was one of the men with whom Stevenson was arguing.

At the punishment phase, the State introduced aggravating evidence: Davila had attempted to escape from jail and seriously injured a detention officer in the process; he had committed an aggravated robbery and an additional murder only two days before the birthday party shooting; he also had been convicted for burglary of a habitation in 2006.

For the mitigation case, the defense offered testimony from Davila's father, sister, mother, maternal aunts, and a psychologist, Dr. Emily Fallis. In summary, they testified that Davila had been raised solely by a teenage mother, with his alcoholic father having been incarcerated for murder since he was very young. Davila's mother told him that he was conceived when his father sexually assaulted her. She was neglectful, abusive, and hateful towards Davila and his sister, and even made them leave the house as teenagers. Davila's sister testified about physical fights she had with their mother. After deliberation, the jury returned a sentence of death.

The Texas Court of Criminal Appeals affirmed Davila's conviction on direct appeal, and the United States Supreme Court denied a writ of certiorari. Davila then pursued state habeas relief. He petitioned the convicting court for a writ of habeas corpus, which was denied. He then sought a writ of habeas corpus from the Court of Criminal Appeals, which adopted the convicting court's findings and conclusions and denied relief. He again petitioned the Supreme Court for a writ of certiorari, which was denied.

Davila then sought federal habeas corpus relief under 28 U.S.C. § 2254. He presented seven constitutional claims:

1) The evidence at trial was insufficient to support his conviction;

2) He received ineffective assistance of trial counsel, appellate counsel, and state habeas counsel;

3) His written confession to this offense was erroneously admitted;

4) His written confession to a separate murder was erroneously admitted;

5) The trial court erroneously denied his motion to preclude the death penalty and declare Article 37.071 of the Texas Code of Criminal Procedure unconstitutional;

6) The trial court erroneously overruled his objection to Texas's "10-12 Rule"; and

7) The trial court erroneously instructed the jury about the burden of proof on mitigation.

In addition to his application for federal habeas relief, he sought an evidentiary hearing and a stay and abeyance to allow him to exhaust an ineffective assistance claim in state court. The district court reviewed the state court proceedings with the deference required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), then denied habeas relief. The court also denied the motion for an evidentiary hearing and a stay and abeyance. The court did not certify any

issue for appeal. Davila now seeks a COA from our court to allow him to proceed on appeal. *See* 28 § U.S.C. 2253(c)(1)(A).

DISCUSSION

We grant a COA only upon "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When the district court denies an applicant's constitutional claims on the merits, a COA will only issue if the applicant shows "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). When the district court denies an applicant's claims on procedural grounds, a COA will only issue if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

AEDPA requires federal district courts to give deference to state court decisions. *See Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). A federal court must not grant habeas relief regarding any claim adjudicated on the merits in state court proceedings unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

A state court's adjudication is "contrary to" Supreme Court precedent if: (1) the state court reaches the opposite conclusion from the Supreme Court on a question of law; or (2) the state court arrives at the opposite result of Supreme Court precedent in a case involving materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is "an unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008). Even if we find that a state court incorrectly applied clearly established federal law, we can only correct the state court if the incorrect application was also objectively unreasonable. *Id.*

A determination of facts by a state court is presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "This presumption of correctness attaches not only to explicit findings of fact, but also to 'unarticulated findings which are necessary to the state court's conclusion of mixed law and fact.'" *Pippin*, 434 F.3d at 788 (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003)).

We must conduct a "threshold inquiry into the underlying merit" of Davila's habeas claims to determine whether a COA should issue. *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029. This inquiry "does not require full consideration of the factual or legal bases" of the claims. *Pippin*, 434 F.3d at 787.

I. Sufficiency of the Evidence Claim

Davila asserts that there was insufficient evidence to support his conviction for capital murder because capital murder in Texas requires specific intent to kill more than one person. He claims the evidence showed he only intended to kill one person: Jerry Stevenson.

The district court denied this claim because Davila's written statement evidenced intent to kill more than one person. Davila's statement included the following: "we were going to have a shoot em up . . . The fat dude was in the middle of the street. The other 3 were on the porch. . . . I was trying to get the guys on the porch and I was trying to get the fat dude." The district court decided that the Texas Court of Criminal Appeals did not unreasonably apply clearly established federal law to assess sufficiency of the evidence, as set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Davila argues that a COA should issue on whether his legal sufficiency claim should be analyzed under Section 2254(d)(1) or (d)(2). Davila asserts that the district court did not address his claim that the Texas

Court of Criminal Appeals made unreasonable determinations of the facts under Section 2254(d)(2), but instead just analyzed his claim under Section 2254(d)(1). An applicant establishes legal error in the state court proceedings under Section 2254(d)(1), but factual error under Section 2254(d)(2). *See Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012). A claim of insufficient evidence is a mixed question of law and fact, which we review under Section 2254(d)(1). *See Miller v. Johnson*, 200 F.3d 274, 281, 286-88 (5th Cir. 2000). Accordingly, we deny a COA on this sub-issue because reasonable jurists would not debate the district court's resolution in light of our precedent.

We must decide whether the Texas Court of Criminal Appeals' rejection of Davila's claim that the evidence was insufficient "was an objectively unreasonable application of the clearly established federal law" as set out in *Jackson*, 443 U.S. 307, 99 S.Ct. 2781. *See Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir. 2001). Evidence is sufficient if, viewing it in the light most favorable to the state prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. We look to state law to determine the substantive elements of the crime. *Coleman v. Johnson*, ___ U.S. ___, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012). Murdering more than one person in the same criminal transaction qualifies as capital murder in Texas. TEX. PENAL CODE § 19.03(a)(7)(A). Murder requires "intentionally or knowingly caus[ing] the death of an individual." *Id.* § 19.02(b)(1). Under

Texas law, a person is still "criminally responsible for causing a result if the only difference between what actually occurred and what he desired . . . is that . . . a different person . . . was . . . harmed." *Id.* § 6.04(b)(2).

Davila's third written statement reveals an intent to kill at least four persons. Because there was only one man at the party, Jerry Stevenson, Davila mistook some of the adult women for men. Under Texas law, Davila's intent to kill four men transferred to the killing of Annette and Queshawn Stevenson. A rational juror could look at that evidence and decide beyond a reasonable doubt that Davila intentionally or knowingly killed more than one person. Reasonable jurists would not find the district court's resolution debatable or wrong. We deny a COA on this claim.

II. Ineffective Assistance of Appellate Counsel Claim

Davila contends that he is entitled to a COA on his claim that his counsel in the direct appeal from his conviction was ineffective for failing to raise an allegedly erroneous jury instruction on appeal.

During deliberations, the jury sent this written question to the trial judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others[?]" The trial judge responded by giving the jury an instruction that for the first time tracked the Texas transferred-intent statute: "A person is nevertheless criminally responsible for causing a result if the only

difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected." This additional instruction was submitted along with another instruction repeating the definitions for "intentionally" and "knowingly." Davila's trial counsel objected to the instruction on the basis that it should not have been sent to the jury until more deliberation had occurred. Davila now claims that counsel should have argued on appeal from the conviction that the additional jury instruction incorrectly stated Texas law because he had to have specific intent to murder more than one person, but the jury charge permitted him to be convicted of capital murder even if he only intended to kill Jerry Stevenson.

Because Davila did not raise this ineffective appellate counsel claim in state habeas proceedings, the district court held it was procedurally defaulted. The district court rejected Davila's argument that *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to

consider the issue to have been based on discretion. We must consider Section 2254 claims when they are non-defaulted, exhausted, and otherwise properly raised. Moreover, *Reed* included one citation to an opinion holding that *Martinez* made an "unambiguous holding" to the effect that "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *Id.* (quoting *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013)).

In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was procedurally defaulted because Davila failed to exhaust it in state court proceedings. *See Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) ("Because both of Blue's arguments with respect to the burden of proof on the mitigation special issue are foreclosed by Fifth Circuit precedent, the correctness of the district court's decision to reject them is not subject to debate among jurists of reason.").

Finally, Davila challenges the district court's resolution of his motion for a stay and abeyance and motion for an evidentiary hearing. Davila sought a stay and abeyance so he could exhaust this claim in state court. A stay and abeyance is warranted when the petitioner shows there was good cause for the failure to exhaust the claim in state court, the claim is not plainly meritless, and there is no indication the failure was for delay. *See Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir.

2010). We review the denial of a stay and abeyance for abuse of discretion. *See Rhines v. Weber*, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). The district court did not abuse its discretion because this claim is meritless, as discussed above, and there was no showing of good cause. Additionally, the district court did not abuse its discretion in denying Davila's request for an evidentiary hearing under Section 2254(e). *See Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir. 2000). Here, the record itself precludes habeas relief and thus, a hearing would not enable Davila to prove factual allegations in his petition that, if true, would entitle him to relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). We deny a COA on this claim.

III. Ineffective Assistance of Trial Counsel Claim

Davila claims his trial counsel was ineffective in failing to make a proper investigation of his background or present a mitigation case to the jury at the punishment phase under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). This claim was presented to the Texas Court of Criminal Appeals and rejected. The district court reviewed the state court's decision[2] and held the state court's resolution of

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[2] To the extent that Davila argues the district court was not limited to the state habeas court's record under *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), because he claims his state habeas counsel was ineffective, we reject that claim. *See Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014); *Ross v. Thaler*, 511 Fed.Appx. 293, 305 (5th Cir. 2013).

the claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and subsequent caselaw. Under *Strickland*, an ineffective assistance of trial counsel claim requires deficient performance and prejudice. *Id.* at 690-92, 104 S.Ct. 2052. Deficient performance is conduct that falls below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. Counsel must conduct a reasonable investigation into a defendant's background in order to make reasonable, strategic decisions about how to present, or whether to present, the mitigation case. *See Wiggins*, 539 U.S. at 521-23, 123 S.Ct. 2527. To show prejudice, Davila must show "a reasonable probability that . . . the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. To determine prejudice in the context of mitigation evidence, the reviewing court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Our limited review is whether reasonable jurists would debate the district court's decision that the Texas court did not unreasonably apply *Strickland* and *Wiggins*.

Davila argues that his trial attorneys were deficient because they failed to hire a mitigation specialist. Davila relies on the ABA Guidelines to claim that the failure to hire a mitigation specialist was deficient performance. The ABA Guidelines are only guides, not

requirements, to determine whether counsel's performance was reasonable. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Here, trial counsel worked together with a clinical psychologist, Dr. Emily Fallis, to investigate and evaluate mitigation evidence. Trial counsel conducted the factual investigation into Davila's background and childhood themselves, with the help of a fact investigator, because they wanted to build relationships with potential witnesses. Counsel interviewed at least 12 family members in addition to friends and employers. Counsel obtained Davila's school records and spoke to former teachers. After conducting initial interviews, counsel would send certain persons to be interviewed by Fallis. The interviews Fallis conducted allowed her to present her testimony more effectively about the impact of Davila's upbringing and background. Counsel also had Davila examined by another psychologist, neurologist, and hired another doctor with expertise in gang activity. Trial counsel made a reasonable decision to maintain responsibility for the factual investigation and to seek the assistance of an expert, Fallis, in evaluating and presenting the mitigation evidence.

Davila also argues that counsel was deficient by failing to uncover additional mitigation evidence from four extended family members identified by mitigation specialist, Toni Knox, who testified at the state habeas proceeding regarding trial counsel's deficient performance. As the district court noted, two of those individuals were contacted at the time of trial but refused to testify or were otherwise uncooperative. We agree with

the district court that counsel was not deficient for leaving the uncooperative family members uncalled. Additionally, as for the other two family members, counsel was not necessarily unreasonable for failing to interview them. "Questioning a few more family members . . . can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Based on the investigation that counsel conducted, it was reasonable to doubt that interviews with these two extended family members would result in different, new information beyond what they already had discovered.

Furthermore, regarding any possible deficient performance in failing to interview the other two witnesses whom Knox identified, the district court held that Davila could not show prejudice. The court concluded that the mitigation evidence Knox presented from these witnesses was of the same kind trial counsel had presented: Davila's mother was neglectful and abusive towards her children. Davila claims that the uncovered mitigation evidence would have shown more details of the type of physical abuse Davila and his sister endured. As the district court noted, such an argument "comes down to a matter of degrees" and is "even less susceptible to judicial second-guessing." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). The additional mitigation evidence presented by Knox "was largely cumulative and differed from the evidence presented at trial only in detail, not in mitigation

thrust." *See Villegas v. Quarterman*, 274 Fed.Appx. 378, 384 (5th Cir. 2008).

Additionally, when compared to the strong aggravating evidence, any incremental increase in mitigation evidence would not create "a reasonable probability that . . . the result of the proceeding would have been different." *See Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Not only were the facts of Davila's shooting of Annette and Queshawn Stevenson aggravating, but he also had a serious criminal history and had admitted to murdering another person days before the birthday party shooting. Furthermore, he attacked and seriously injured a guard while trying to escape jail prior to his trial. Finally, as the district court noted, evidence demonstrating abuse to Davila and his sister could undermine any possible mitigating effect, because his sister made different choices than Davila despite growing up in the same environment. *See Guevara v. Stephens*, 577 Fed.Appx. 364, 369 (5th Cir. 2014).

Reasonable jurists would not debate the district court's conclusion that Davila's attorneys conducted a reasonable investigation, made reasonable strategic choices, and that any other available mitigation evidence could not outweigh the aggravating evidence. We deny a COA on this claim.

IV. Suppression Issues

Davila presented four claims to the district court involving suppression of statements he made. He has

grouped them together in his application for a COA. They seek suppression of Davila's oral and written statements under the Fourth, Fifth, and Sixth Amendments.

First, we address his Fourth Amendment claims. The district court held that *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), prevented review of Davila's Fourth Amendment claims because Davila had an opportunity to fully and fairly litigate these in state court.

Davila argues that *Stone* has never been applied by the Supreme Court in a capital case. The district court noted that panels of our court have applied *Stone* in capital cases. *See, e.g.*, *ShisInday v. Quarterman*, 511 F.3d 514, 524-25 (5th Cir. 2007). The Supreme Court has never indicated that *Stone* does not apply in capital cases. Davila argues that AEDPA should have abrogated the rule in *Stone*. Our circuit has continued to apply *Stone* after AEDPA to capital cases. *See id.*; *see also Busby v. Dretke*, 359 F.3d 708, 722-23 (5th Cir. 2004); *Balentine v. Quarterman*, 324 Fed.Appx. 304, 306 (5th Cir. 2009). In light of our binding precedent, reasonable jurists would not debate the district court's determination that *Stone* barred Davila's Fourth Amendment claims if he had a full and fair opportunity to litigate them in state court.

The district court noted that Davila had moved to suppress all his oral and written statements. Prior to trial, the state court held a hearing and heard evidence on Davila's Fourth Amendment claims. The state court

denied Davila's motion to suppress. Davila again raised the validity of his arrest warrant during the state trial, and the trial court denied his motion again on a different basis. On direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's rulings. Jurists of reason would not debate that Davila was given a full and fair opportunity to litigate his Fourth Amendment claims. *See Janecka v. Cockrell*, 301 F.3d 316, 320-21 (5th Cir. 2002).

For his Fifth and Sixth Amendment claims, Davila argues that his written statements were not voluntary because he was in "custodial interrogation for seven hours" without anything to eat or drink and without using the restroom. This claim was presented during state habeas proceedings, and the state court resolution of it must be given AEDPA deference. Whether a confession is voluntary is ultimately a legal question, which sometimes involves subsidiary mixed issues of law and fact, and accordingly, we review it under Section 2254(d)(1). *See Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998). Any purely factual sub-questions are presumed correct, unless shown to be unreasonable determinations of fact by clear and convincing evidence. *See id.*; 28 U.S.C. § 2254(d)(2), (e)(1). To determine voluntariness, we consider the "totality of the circumstances." *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir. 2009). "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.*

The district court determined that the state court's evaluation of the voluntariness of Davila's confession was not an unreasonable application of, or contrary to, clearly established Supreme Court precedent. The state court noted that Davila never requested food, a drink, or a restroom break while he was in custody. Davila points to no clearly established federal law that the state court unreasonably applied in deciding that these facts did not show coercive or improper activity. The district court's resolution would not be debated among jurists of reason. We deny the COA on the suppression claims.

V. Claims Regarding the Texas Death Penalty Scheme

a. Violation of the Fifth Amendment Grand Jury Guarantee

Davila claims that the Texas death penalty scheme, Article 37.071 of the Texas Code of Criminal Procedure, violates the Fifth Amendment because the special issues considered at the punishment phase are not presented to the grand jury that returns the indictment. Both the Texas Court of Criminal Appeals and the district court rejected this claim because the Fifth Amendment's guarantee to a grand jury indictment has not been extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Reasonable jurists would not debate the district court's resolution in light of *Albright*. *See Kerr v. Thaler*, 384 Fed.Appx. 400, 402-03 (5th Cir. 2010). We deny the COA.

b. Violation of the Eighth and Fourteenth Amendments

Davila argues that Article 37.071 violates the Eighth and Fourteenth Amendments. Under Texas's death penalty statute, capital jurors first consider a future dangerousness special issue set out in the statute. TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1). The jury is instructed that it cannot answer "yes" to the future dangerousness issue unless it agrees unanimously, and cannot answer "no" unless ten or more jurors agree. *Id.* § 2(d)(2). If the jury answers "yes" to the future dangerousness special issue, the jury is to answer a mitigation special issue that also is in the statute. *Id.* § 2(e)(1). For that special issue, the jurors are instructed that they cannot answer "no" unless they all agree and cannot answer "yes" unless ten or more jurors agree. *Id.* § 2(f)(2). This system is called the "10-12 Rule." *Alexander v. Johnson*, 211 F.3d 895, 897 (5th Cir. 2000). The judge is to sentence the defendant to death if the jury answers the future dangerousness issue "yes" and the mitigation issue "no." TEX. CODE CRIM. PROC. art. 37.071 § 2(g). If the jury answers "no" to the future dangerousness issue, "yes" to the mitigation issue, or "is unable to answer" either issue, then a life sentence results. *Id.*; *see also Blue*, 665 F.3d at 669 (explaining TEX. CODE CRIM. PROC. art. § 37.071). Neither the court nor the parties may inform jurors that their failure to agree on an answer will result in a life sentence. *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(a)(1), (g).

First, Davila claims the 10-12 Rule misleads the jury on its role in the sentencing process because the jury is not told "a single juror is statutorily permitted to cause a sentence of life" by preventing unanimous agreement to the future dangerousness special issue. He argues the Texas death penalty statute, therefore, runs afoul of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We have already rejected this argument. *See Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011).

Second, he claims that the 10-12 Rule violates his right to individualized sentencing under *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Davila asserts that a reasonable juror could believe that his vote on the sentencing special issues is meaningless unless enough jurors agree with him because there is no instruction on the effect of a lack of unanimity. We have also rejected this claim. *See Reed*, 739 F.3d at 779.

Davila argues that the post-1991 Texas death penalty scheme, which now includes a true mitigation special issue under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), has not been squarely addressed by our court. Yet, we have considered the 10-12 Rule since the 1991 changes to Article 37.071 and have held that the mitigation special issue does not violate *Mills* or *McKoy*. *See Allen v. Stephens*, 805 F.3d 617, 624, 631-33 (5th Cir. 2015). The Texas death penalty scheme does not create the possibility that reasonable jurors would think they all had to

agree on particular mitigating evidence like the statute in *Mills* did; instead, each juror can independently consider mitigating evidence. *See* 486 U.S. at 384, 108 S.Ct. 1860; *see also Druery*, 647 F.3d at 543 & n.5. We have also held that this argument is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005). Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

c. Violation of the Sixth Amendment Right to Proof Beyond a Reasonable Doubt

Finally, Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).

Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the

ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621-22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

We DENY the COA as to all claims. All pending motions are denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70013

ERICK DANIEL DAVILA,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Filed Jun. 28, 2016)

(Opinion 5/26/16, 5 Cir., ___, ___ F.3d ___)

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on

Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
UNITED STATES CIRCUIT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 13, 2017

Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Erick Daniel Davila
v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division
No. 16-6219
(Your No. 15-70013)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk